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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States

The Petitioner, Ford Motor Company, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit in banc filed in these proceedings on January 9, 1976. This review is sought solely as to that part of the opinion which held that petitioner was only entitled to a six-person jury under the local United States District Court Rules, even though the Constitution of Missouri and the decisions of its Supreme Court require a twelve-person jury in all cases.

A timely filed Second Petition for Rehearing was overruled by the Court of Appeals.

OPINIONS BELOW

The verdicts in favor of plaintiffs in these causes were rendered by a six-person jury in United States District Court for the Western District of Missouri. Those verdicts and the judgments rendered thereon appear in this Petition as Appendix A.

The first opinion of the United States Court of Appeaos for the Eighth Circuit filed on October 30, 1974, is unreported. It reversed the verdicts in favor of plaintiffs and the judgments thereon and the same appears in this Petition as Appendix B.

A Petition for Rehearing was filed on November 13, 1974, and the Order granting the rehearing before the Court of Appeals for the Eighth Circuit in banc dated November 22, 1974 appears as Appendix C.

The opinion of the United States Court of Appeals for the Eighth Circuit on the rehearing in banc was filed on January 9, 1976, and appears as Appendix D and is as yet unreported.

A second Petition for Rehearing in banc was denied on February 19, 1976, and with the order of the Court of Appeals denying further rehearing appears as Appendix E.

A Stay of Mandate was issued by the Court of Appeals on February 23, 1976, and extended on March 23, 1976. Both of those orders appear as Appendix F.

The judgments of the United States Court of Appeals for the Eighth Circuit affirming the verdicts and the judgments entered thereon to be reviewed by this Court were entered on January 9, 1976, and appear as Appendix G.

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JURISDICTION

The first opinion of the Eighth Circuit Court of Appeals (Appendix B) was filed on October 30, 1974. It reversed the verdicts and the judgments entered thereon by the United States District Court for the Western District of Missouri. That reversal was based on other grounds and did not reach the question of whether the Petitioner was denied its substantive state rights by the requirement that this cause be tried to a six-person jury, rather than a twelve-person jury, as provided under Article I, Section 22(a) of the Constitution of the State of Missouri, 1945. That denial to this Petitioner was in contravention of the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938).

On November 22, 1974, the United States Court of Appeals for the Eighth Circuit on the Petition of the original plaintiffs ordered that the case be reheard in banc. (Appendix C)

On January 9, 1976, the Court of Appeals in banc reversed the Panel decision, and affirmed the judgments on the verdicts of the United States District Court for the Western District of Missouri. (Appendix D) The Second Petition for Rehearing was filed on January 30, 1976, and overruled on February 19, 1976. (Appendix E)

The Eighth Circuit Court of Appeals addressed itself for the first time in its in banc opinion to the issue to be placed before this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Should the Eighth Circuit Court of Appeals be allowed to deny Petitioner its substantive state right to a trial by a 12-person jury in a Federal diversity case, in contravention of *Erie Railroad Company* v.

Tompkins, supra, based upon a local rule of the United States District Court for the Western District of Missouri requiring trial by only a six-person jury.

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 22(a), Constitution of the State of Missouri

§22(a). Right of trial by jury—qualifications of jurors—two-thirds verdicts

Section 22(a). That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

STATEMENT OF CASE

Federal jurisdiction was initially based on diversity of citizenship, 28 U.S.C. 1332. This consolidated diversity action arose out of an automobile accident in Kansas City, Missouri. The original plaintiffs, Polk and Marshall, sued Ford Motor Company on the theories of negligence and strict liability for producing a defective vehicle. The principal issue involved in the case was whether Missouri would adopt the so-called "second collision" doctrine. The United States District Court so held, and submitted the cases to the jury on that theory. Ford Motor Company appealed from the judgments on the verdicts for the plaintiffs,

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and the three judge panel of the Eighth Circuit Court of Appeals reversed the United States District Court. The Eighth Circuit Court of Appeals sitting in banc reheard the case and filed its opinion on January 9, 1976. It reversed the panel and affirmed the judgments on the verdicts for the plaintiffs in the United States District Court. The Court in banc purported to dispose of the issue of six-person juries at page 23 of its printed opinion (Appendix D, pp. A64-A65):

> "The use of a six-person jury in Federal Court under local rule was expressly approved in *Colgrove* v. *Battin*, 413 U.S. 149 (1973); procedural matters are governed under federal law. *Guaranty Trust Company* v. *York*, 326 U.S. 99 (1945)."

Subsequent to the filing of the opinion by the Eighth Circuit Court of Appeals, petitioner filed its Petition for Rehearing which was denied February 19, 1976. (Appendix E) A Stay of Mandate was issued by the Court of Appeals on February 23, 1976, and extended March 23, 1976, to April 14, 1976. (Appendix F)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Eighth Circuit Court of Appeals Denied Petitioner a Substantive Right to a Trial by a Twelve-Person Jury As Guaranteed Petitioner Under Article I, Section 22(a) of the Constitution of the State of Missouri, 1945, and Decisions of the Supreme Court of the State of Missouri, in Contravention of Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938).

Over the objection of all parties, this case was tried to a six-person jury pursuant to Rule 20R of the Local Rules of the United States District Court for the Western District of Missouri, Western Division. These

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objections were that such a trial did not give the parties the right to a trial by a twelve-person jury, as guaranteed by the Constitution of Missouri, 1945.

This case involves the significant and important question of whether a party litigant's *substantive* state right to a trial by a jury consisting of twelve persons may be nullified by a local District Court rule in diversity cases. This question was not raised and, therefore, was not considered by this Court in *Colgrove* v. *Battin*, 413 U.S. 149, 37 L. Ed. 2d 522, 93 S. Ct. 2448 (1973). The only question presented to this Court in *Colgrove, supra,* was whether the local rule of the United States District Court in Montana violated the Seventh Amendment of the Constitution of the United States. The Montana Rules of Civil Procedure, 93-1205 provide that in civil actions and cases for misdemeanors, the parties may stipulate to less than twelve jurors, or in *all* civil actions where the prayer is for less than $10,000, the jury can consist of six jurors in the discretion of the judge. Further, no Montana Appellate Court had held that trial by a twelve-person jury was a substantive state right. Thus, this Court in *Colgrove, supra,* considered whether a local United States District Court rule violated the Seventh Amendment, but not whether that local Federal rule should be applied in light of a conflicting provision of the state Constitution.

The importance of the question presented is reflected by the fact that twenty states, including Missouri, require 12 person juries either by Court decision or by state constitution.

On at least three recent occasions this Court has considered the size of juries under the provisions of the Constitution of the United States. Those cases do not deny the right of the states to determine for them-

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selves the size of juries. Since diversity cases are predicated on state law that law should control.

In *Williams* v. *Florida*, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893 (1970), this Court decided the question of whether the Constitutional guarantee of a trial by a jury necessarily required trial by exactly twelve persons, rather than some lesser number. In *Williams, supra,* the number in question was six. This Court held that the twelve-person panel was not a necessary ingredient of "trial by jury", and that the respondent's refusal to impanel more than six persons as provided by a Florida Statute did not violate petitioner's Sixth Amendment rights as applied to the state through the Fourteenth Amendment.

Justice White, for the majority in *Williams* in closing his opinion at pages 461-62, 26 L. Ed. 2d stated:

> "We do not mean to intimate that legislatures can never have good reasons for concluding that the twelve-man jury is preferable to the smaller jury, or that such conclusions—reflected in the provisions of most states in our federal system—are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries, and may conclude that, wholly apart from the juries' primary function, it is desirable to spread collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no state provides for less than twelve jurors—a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty. *Our holding does no more than leave these considerations to Congress and the states,* unrestrained by an interpretation of the Sixth

> Amendment that would forever dictate the precise number that can constitute a jury." (Emphasis added)

Justice White made it abundantly clear in his opinion that this decision did not take away the right of the states to determine for themselves whether a twelve or six-person jury serves the best interests of justice. The *Williams* case, *supra*, permitted the state of Florida to establish trial by six-person juries. Missouri should be permitted by this Court to require that the number of its jurors be twelve.

In *Duncan* v. *Louisiana*, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968), Justice Fortas in a concurring opinion supported the right of the state to determine the size of a jury. The holding of this case was that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which--were they to be tried by Federal Court—would come within the Sixth Amendment guarantee. Justice Fortas states at p. 534, 20 L. Ed. 2d:

> "I would make these points clear today. Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but

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all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. *It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 states. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the states as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith."* (Emphasis added)

This Court last considered the size of juries as they relate to the Bill of Rights in *Colgrove* v. *Battin*, 413 U.S. 149, 47 L. Ed. 2d 522, 93 S. Ct. 2448 (1973). At issue in *Colgrove, supra,* was whether a local United States District Court rule which limited juries in the trial of civil cases to six members was in conflict with the Seventh Amendment of the United States Constitution, Rule 48 of the Federal Rules of Criminal Procedure or 28 U.S.C. 2072. This Court held that the local rule did not conflict with any Federal statutes, Federal rules or the Seventh Amendment to the Constitution.

It is essential and significant to this Petition for review that *Colgrove, supra,* not be considered as gov-

erning this case. Although *Colgrove, supra,* was a diversity case, as is the instant case, the state of Montana, whose law was being applied, did not have the state constitutional guarantee of a right to a twelve-man jury as does the state of Missouri. Further, the issue of the protection afforded substantive state rights by *Erie* v. *Tompkins, supra,* was never raised. Federal Courts in promulgating local rules should be limited in applying their local rules to situations where the Court is applying federal law. They should not be permitted to abridge the rights of the citizens of those states who have specifically been guaranteed the right to a twelve-person jury.

In cases based solely on diversity of citizenship, the substantive law of the forum in which the court sits must be applied in its entirety. If a state prescribes twelve-person juries, United States District Courts should not be allowed to abrogate the will of the people. A decision to the contrary would not be in accord with the holding of *Erie* v. *Tompkins, supra,* in this most significant constitutional area.

Colgrove, supra, was decided by this Court by the narrowest of margins. The basis for this "narrowest of margins" was the diametrically opposed interpretation given by the majority and the minority to constitutional history. This Court differed on the meaning of the word "jury" as it was originally contemplated under the Common Law.

Justice Marshall, in his dissent in *Colgrove, supra,* pointed out the states' efforts from the beginning of the country to establish clearly that the right to a jury trial included, without doubt, the right to a twelve-person jury. Justice Marshall citing *Williams* v. *Florida, supra,* stated:

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> "The states that had adopted constitutions by the time of the Philadelphia convention in 1787 appeared for the most part to have either explicitly provided that the jury would consist of twelve or have subsequently interpreted their jury trial provision to include that requirement."

It was clear from the two separate dissenting opinions of four justices of this Court, that *Colgrove, supra,* stands in the face of confusing constitutional history, statutes and rules which, on their face, at least in the eyes of the minority, clearly prescribed twelve-person juries. In light of *Colgrove, supra,* this Court should not further permit the erosion of rights vested exclusively in the various states. This is the right of a state and its citizens to determine the size of juries to hear cases predicated on state law.

Article I, Section 22(a) Missouri Constitution, 1945, provides in pertinent part:

> "§22(a)—That the right of trial by jury as heretofore enjoyed shall remain inviolate: provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than twelve citizens as may be prescribed by law. . ."

In construing Article I, Section 22(a), the Supreme Court of Missouri has consistently held that the constitutional right of trial by jury means the right, unless waived, to a trial by twelve impartial qualified jurors. *Rodenhauser* v. *Lashly,* 481 S.W. 2d 231 (S. Ct. Mo., 1972); *Beggs* v. *Universal C.I.T. Credit Corp.,* 387 S.W. 2d 499 (S. Ct. Mo., En Banc, 1965); *Murphy* v. *Graves,* 294 S.W. 2d 29 (S. Ct. Mo., 1956); *Piehler* v. *Kansas City Public Service Company,* 211 S.W. 2d 459 (S. Ct. Mo., 1948); *Vaughn* v. *Scade,* 30 Mo. 600 (1860).

It is clear that the Constitution of Missouri, and the Supreme Court of Missouri interpreting that Constitution, requires a twelve-person jury in civil cases. Any reduction in that number constitutes a substantive change in the right to trial by jury. This was initially decided in 1860 in *Vaughn* v. *Scade, supra,* where the Court held that where there was a constitutional guarantee of the right to trial by jury, the jury must be composed of twelve members. The Missouri Supreme Court, in that early holding, states that the term "trial by jury" was well-known and understood at Common Law, and in that sense it was adopted in the Bill of Rights to the Constitution.

The Missouri Supreme Court conceded that the non-essentials of right to jury trial, such as those relating to the qualification of jurors, the mode of summoning them, and other matters, were left to the regulation of law; however, the Court stated that *if there are any essential requisites to that institution, certainly the number of jurors must be among them.* If the declaration of rights did not preserve these elements of trial by jury from change, then it would be in the power of the General Assembly to take away from that mode of trial all those incidents which have endeared it to the people among whom it had prevailed. If, in cases where the right to trial by jury was not secured the number of jurors could be reduced from twelve to six, it could with equal propriety be reduced to four or two. The Supreme Court of Missouri reiterated its position as late as 1972 in *Rodenhauser* v. *Lashly, supra,* at p. 234:

> "Plaintiff concedes that a party is entitled to a trial by twelve impartial qualified jurors. As the Court stated in Piehler v. Kansas City Public Service Co., 357 Mo. 866, 211 S.W. 2d 459, 463,

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> 'The right of trial by jury guaranteed by our Constitution, if it is to be worth anything, must mean, as this court has said, "the right to a fair and impartial jury" . . . Certainly, also a party is entitled, unless he waives it, to a jury of twelve impartial qualified men. Even though three-fourths of them can decide a civil case, parties are entitled to have their decision, whether for them or against them, based on the honest deliberations of twelve qualified men.' "

The doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U.S. 64 (1938) requires that Federal Courts in diversity cases apply state rules of substantive law and grant to party litigants the rights to enforce state substantive law in the trial of diversity cases in the Federal Courts. In *Erie, supra*, this Court held at l.c. 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute, or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in nature or 'general', be they commercial law or any part of the law of torts. And no clause in the Constitution purports to confer such power upon the Federal Courts."

The citizens of Missouri by approving the Constitution of Missouri, 1945, established in their Bill of Rights an inalienable right to trial by a twelve-person jury in civil cases in all courts of record.

Petitioner's rights arise under State law. Likewise, any action to enforce that right is governed by State law. As this Court stated in *Guaranty Trust Company of New York* v. *York*, 326 U.S. 99 (1945) at l.c. 108-109:

> "Here we are dealing with a right to recover derived not from the United States, but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a Federal, as well as in a State Court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a Federal Court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of that right as given by the State."

The operation of a dual judicial system should not prejudice this petitioner's right to a trial in accordance with the law of Missouri, under which it was sued. The United States District Court rule denied petitioner that right merely because this case was filed and tried in the Federal Court. The Missouri Constitutional right to trial before a twelve-person jury provided in Article I, Section 22(a) is not a procedural right. The application of the state constitutional provision would not essentially alter the character and function of the Federal Court and the United States District judge. No such issue is presented in the instant case. Rather the question is simply whether the petitioner should be afforded its substantive state right to trial before a twelve-person jury as required by Article I, Section

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22(a) of the Constitution of Missouri, 1945, and *Erie Railroad Company* v. *Tompkins, supra.*

The right to trial before a twelve-person jury is guaranteed by Article I, Section 22(a), Constitution of Missouri, 1945, and is a substantive state right. The United States District Court was bound by the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* to afford this petitioner its substantive state rights in the instant case, and did not do so.

CONCLUSION

For the reasons stated above a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 9, 1976.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

[973] **JURY'S VERDICT**

The Clerk: Yes, your Honor, the verdict in this case is as follows: "We, the jury in the above-entitled cause unanimously find in favor of the plaintiff, Thomas Polk, and against the defendant, Ford Motor Company, and assess plaintiff's damages in the sum of two hundred thousand dollars. Signed Ronald L. Wolfe, Foreman of the Jury."

"We, the jury in the above-entitled action, find in favor of plaintiff, Ethel Lee Marshall, and against the defendant, Ford Motor Company, and assess the plaintiff's damage in the sum of fifty thousand dollars. Signed, Ronald L. Wolfe, Foreman of the jury."

United States District Court
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action File No. 19786-2

THOMAS POLK,
Plaintiff,
vs.
FORD MOTOR COMPANY,
Defendant.

JUDGMENT

(Filed November 17, 1972)

This action came on for trial before the Court and a jury, Honorable William R. Collinson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Thomas Polk, have and recover the sum of $200,000.00 from the defendant, Ford Motor Company, together with his costs herein expended, and have execution therefor.

Dated at Kansas City, Missouri, this 17th day of November, 1972.

/s/ J. C. Truman
Clerk of Court

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action File No. 19787-2

ETHEL LEE MARSHALL, Guardian,
Plaintiff,

vs.

FORD MOTOR COMPANY,
Defendant.

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JUDGMENT

(Filed November 17, 1972)

This action came on for trial before the Court and a jury, Honorable William R. Collinson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged the plaintiff, Ethel Lee Marshall, Guardian, have and recover the sum of $50,000.00 from the defendant, Ford Motor Company, together with her costs herein expended, and have execution therefor.

Dated at Kansas City, Missouri, this 17th day of November, 1972.

/s/ J. C. Truman
Clerk of Court

APPENDIX "B"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 73-1255 and 73-1256

No. 73-1255

Thomas Polk,
Appellee,

v.

Ford Motor Company,
Appellant.

No. 73-1256

Ethel Lee Marshall, Guardian,
Appellee,

v.

Ford Motor Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: November 12, 1973
Filed: October 30, 1974

Before MEHAFFY and MOORE, Senior Circuit Judges,* and WEBSTER, Circuit Judge.

MEHAFFY, Senior Circuit Judge.

This consolidated diversity action arose out of an automobile accident in Kansas City, Missouri involving a 1970 Ford Maverick. Plaintiffs Polk and Marshall sued Ford Motor Company on the theories of negligence and strict liability. The principal issue involved is whether Missouri would adopt the second collision doctrine. The district court held that it would and submitted the case to a jury. Ford appealed from verdicts for the plaintiffs. For the reasons hereinafter set forth we reverse.

On October 9, 1969 Demple Mae Martin was a passenger in a 1970 Ford Maverick being driven by plaintiff Polk at a speed of approximately 45 to 50 miles per hour on an interstate highway in Kansas City, Missouri. The right-rear section of the automobile was struck by another auto traveling in the same direction at a speed estimated to be 90 to 100 miles per hour. The impact shoved the Maverick over the left curb and into and scraping along a concrete wall dividing the east and westbound lanes. It then overturned and slid approximately 100 feet up the roadway on its roof before coming to a stop and bursting into flames. Polk was seriously burned in the ensuing fire while extricating himself from the auto, through a window. The roof supports collapsed and Martin could not be removed. She died in the accident and plaintiff Marshall was

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*The Honorable LEONARD P. MOORE, Senior Circuit Judge, Second Circuit, sitting by designation.

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appointed guardian of her minor children. Polk and Marshall each brought a diversity action against Ford in the United States District Court for the Western District of Missouri. Plaintiffs asserted that Ford was negligent in designing and constructing a flange mounted fuel tank; negligent in designing and failing to test the Maverick's roof supports; and that the Maverick was a defective and unreasonably dangerous product.

The actions were consolidated on January 28, 1972 and the case was subsequently tried before a jury. The district court instructed the jury that Ford had a duty to use reasonable care in the design and testing of the 1970 Ford Maverick to avoid subjecting the driver or passengers to an unreasonable risk of injury in the event of collision. A verdict was returned awarding $200,000.00 to Polk and $50,000.00 to Marshall. Defendant Ford moved for a directed verdict at the close of all the evidence and for judgment notwithstanding the verdict after the verdict was returned. The motions were denied and Ford appealed to this court contending, *inter alia*, that the so-called "second collision" doctrine, upon which Ford's liability was predicated and on which the jury was instructed, is not Missouri law. We agree and must reverse the district court.

The second collision or enhanced injury doctrine is the legal concept which imposes liability based on the construction or design of a product which causes enhanced or greater injuries in the course of or following an initial accident or collision brought about by some independent cause. This theory has risen in recent years and has resulted in a split among the courts faced with the issue. For a recent survey of cases see *Frericks v. General Motors Corp.*, ... Md. App. ...., 317 A.2d 494 (1974). The landmark case accepting the

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doctrine is *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) (applying Michigan law). The standard bearer of the cases rejecting the doctrine is *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.) (applying Indiana law), *cert. denied*, 385 U.S. 836 (1966).

At bottom, we feel that acceptance or rejection of the doctrine must turn upon the scope of a manufacturer' duty. Application of the second collision doctrine requires a court to hold that a manufacturer has a duty to foresee accident situations and, consequently, a duty to design and construct its product to prevent enhanced injuries in such cases. Acceptance of the doctrine requires, therefore, recognition of a broad scope of the duty element. If a court holds that a manufacturer is not required to foresee accident situations into which its product may be thrust, it is recognizing a narrower scope of the manufacturer's duty and is, thus, rejecting the second collision doctrine. Plaintiffs argue that this court is committed to the second collision doctrine under the holdings of *Larsen* and *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972) (applying Iowa law). However, this is a diversity case and the substantive law of Missouri is controlling.

The question of a manufacturer's duty in the manufacture of an automobile is a question of substantive law. *Larsen v. General Motors, supra* at 498; *accord, Evans v. General Motors, supra* at 824. Consequently, the federal court making that determination is limited to ascertaining and applying the appropriate state's law. *Ross v. Philip Morris & Co.*, 328 F.2d 3, 7 (8th Cir. 1964); *Yoder v. Nu-Enamel Corp.*, 117 F.2d 488 (8th Cir. 1941). The responsibility of a federal court in this diversity case is not to formulate the legal mind of the State, but merely to ascertain how the

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Missouri Supreme Court would decide the issue, taking into consideration any persuasive data that is available, such as compelling inferences or logical implications from other or related adjudications of its courts.[1] *Yoder v. Nu-Enamel Corp.*, *supra* at 489; *Hacker v. Rector*, 250 F. Supp. 300, 301 (W. D. Mo. 1966).

We have carefully reviewed the decisions of the Missouri courts and this scrutiny has continued since submission of the case. All the parties are agreed that the Missouri Supreme Court has not had occasion to specifically deal with the second collision doctrine. Our decision must, therefore, turn primarily on a careful analysis of the Missouri courts' treatment of the manufacturer's duty. There are two cases in which the Missouri Supreme Court addressed itself to the matter of duty in the area of products liability which we find particularly relevant in our determination. *Hays v. Western Auto Supply Co.*, 405 S.W.2d 877 (Mo. 1966); *Stevens v. Durbin-Durco., Inc.*, 377 S.W.2d 343 (Mo. 1964).

Stevens involved an action against the manufacturer of a load-binder for negligent design in the failure to design and build a safety rachet into the load-binder. The Missouri Supreme Court affirmed a directed verdict for the defendant manufacturer because of the plaintiff's failure to show the existence or breach of any duty owed to plaintiff. The court said:

> But the manufacturer is not liable as an insurer, and he is under no obligation to make the

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1. Although we give great weight to the determination of local law by a district court under such circumstances, we are not bound by that determination. *Bagley v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192, 194 (8th Cir. 1974); *Luke v. American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019 n.6 (8th Cir. 1972), *aff'd, en banc*, 476 F.2d 1023.

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> product accident proof or foolproof. [Citing, *inter alia, Campo v. Scofield,* 301 N.Y. 468, 95 N.E.2d 802 (1950).] Since practically any product, regardless of its type or design, is capable of producing injury when put to particular uses, 'a manufacturer has no duty so to design his product as to render it wholly incapable of producing injury, * * * *'

Id. at 346-347.

The *Hays* case also involved an alleged defective design; however, the suit was brought against the dealer rather than the manufacturer. The product in that case was a riding lawn mower which an eight-year-old boy backed over his two-year-old brother. The plaintiff contended that the failure of the machine to have a shield on the rear of the blade housing made it inherently dangerous. The Missouri Supreme Court held that the plaintiff did not make a case on his theory of negligence saying that:

> While all power mowers are dangerous if not carefully operated, there is nothing in this case to support a finding that this machine was an imminently or inherently dangerous product, and that Western should have foreseen that injury would probably result if it was sold to a customer.

Hays v. Western Auto Supply Co., supra at 883.

On the issue of causation the court further held that the lack of a guard was not the proximate cause but rather the misuse of the machine. The court then quoted from an Illinois case:

> As stated by Professor Bohlen in his work on Torts, and quoted in Campo v. Scofield, ' "The manufacturer cannot be required to contemplate

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> a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker." '

Id. at 884.

It is significant that *Campo v. Scofield* which was decided by the New York Court of Appeals in 1950 was cited in *Stevens* and referred to in *Hays*. *Campo* involved an onion topping machine in which plaintiff's hand was injured. He contended that the defendant's manufacturer was negligent in failing to design and build guards or an emergency stopping device into the machinery. The court of appeals held that the complaint failed to state a cause of action saying that the duty of a manufacturer of a machine was to make the machine function properly for the purpose for which it was designed, not to make it accident proof or foolproof. A more recent New York case involving a Volkswagen had facts very similar to the present case under consideration. *Edgar v. Nachman*, 37 App. Div.2d 86, 323 N.Y.S.2d 53 (1971), *motion for leave to appeal denied*, 29 N.Y.2d 483, 324 N.Y.S.2d 1029. In that case the plaintiff made several allegations of defective design of the gasoline tank which had caught fire after a violent head-on collision with another car. The court said "The New York rule is stated in Campo v. Scofield," and expressly rejected the second collision doctrine.[2] The landmark *Evans* opinion also referred to *Campo* as have other courts which rejected the second collision doctrine. *Evans v. General Motors, supra*

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2. The New York Court of Appeals subsequently held that liability may be imposed upon the manufacturer when the defect is latent. *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769 (1973).

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at 824; *Alexander v. Seaboard Air Line Railroad Co.*, 346 F. Supp. 326 (W.D. N.C. 1971); *Shumard v. General Motors Corp.*, 270 F. Supp. 311, 312 (S.D. Ohio 1967). The Maryland Court of Special Appeals also rejected the second collision doctrine and had this to say about the significance of *Campo:* "*Evans, supra,* grounded its decision essentially upon the precepts of Campo v. Scofield, * * *." *Frericks v. General Motors Corp.*, ... Md. App. ....., 317 A.2d 494, 499 (1974).

Plaintiffs argue that *Hays* and *Stevens* are distinguishable from the instant case on their facts. Clearly, they are. However, the Missouri Supreme Court's remarks regarding the scope of a manufacturer's duty contained in these opinions and its adoption of the *Campo* rule provide a logical implication that it would follow *Evans* and reject the second collision doctrine. The inference which these cases compel is that an automobile manufacturer's duty is not so broad as to require it to design its product so as to avoid subjecting the driver or passengers to an unreasonable risk of injury in the event of the auto's involvement in a violent collision.

Plaintiffs also argue that adoption by the Missouri Supreme Court of the doctrine of strict liability set forth in RESTATEMENT (SECOND) OF TORTS § 402A (1964) is an indication that it would approve of and adopt the second collision doctrine. *Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969). Judge Webster would also accept this interpretation. However, the argument is untenable because the doctrine of strict liability does not obviate the existence of a duty on the part of the manufacturer. This particular point was discussed by the Mississippi Supreme Court in an opinion which rejected the second collision doctrine:

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> The strict liability rule for products liability cases adopted by this Court eliminates the necessity to show negligence in the manufacture of the product, where it is shown that the product left the hands of the manufacturer in a defective condition, but this rule does not eliminate the requirement that, even where there is a defect in the product, there must be some duty owed to the plaintiff with regard to the defect, growing out of the intended normal use for which the product was manufactured.

Walton v. Chrysler Motor Corp., 229 So.2d 568, 573 (Miss. 1969).

The required existence of a duty in an action alleging strict liability is expressed in a different manner. It is implicit in the requirement that the product be "defective and therefore dangerous when put to a use reasonably anticipated." *Keener v. Dayton Electric Mfg. Co., supra* at 366. If we held that involvement of the Ford Maverick in this violent collision could be a use reasonably anticipated we would, in effect, be recognizing that its manufacturer could be held to the broad duty of foreseeing accident situations. We are convinced that the Missouri Supreme Court would not so hold.

Inasmuch as plaintiffs failed to state a claim for which relief could be granted against defendant under our interpretation of Missouri law, the trial court erred in not granting defendant's motion for a directed verdict. We do not reach defendant's other allegations of error since reversal on the above stated ground is dispositive of this action.

Judgment for plaintiffs Polk and Marshall is reversed and the case remanded with directions that judgment be entered for defendant Ford Motor Company.

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MOORE, Senior Circuit Judge, Concurring.

I concur in the opinion and the reasoning therein of the Chief Judge. Our present task is to endeavor to decipher the probable decision of the Missouri Supreme Court upon the particular facts of this particular case. Upon these facts and such applicable principles of law as have emanated from that court with respect to liability, I am left with no doubt that our present decision would not conflict with Missouri law were these facts before them.

In arriving at this conclusion I do not rely upon any "doctrine." A "second collision," "strict liability," or "enhanced liability" doctrine cannot, as a template, be placed upon a set of facts and objectively mark out the proper decision. In short, I would eschew doctrines for facts. Proceeding at 40-50 miles per hour, the Ford Maverick was struck by the other car going 90-100 miles per hour. At rest at a curb the car probably would have been completely demolished by such a blow, including a gas tank explosion.

The courts, in expanding automobile manufacturers' liability under modern conditions, point to foreseeability of highway collisions, to which might well be added overturning. In view of these possibilities it would be expected that the roof supports of a car should be sufficiently strong so as not to collapse if the car were overturned. But this is not the situation here. The Ford was propelled for 100 feet on its roof after structural damage from the impact at some 50 miles an hour. Countless hypothetical cases can be envisioned such as a car driving by a construction site at a moment when a steel girder falls, demolishing the car roof. A car at rest might be struck from the rear at a low speed, causing a passenger to sustain a whiplash neck injury. Query: whether common sense would

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require the manufacturers of cars to build roofs to cope with falling girders or cars fully protected against whiplash injuries. Even military tanks are not impervious to destruction and burning if struck by sufficient force.

There is nothing in recent Missouri law which would indicate, if there must be "doctrines," a departure from a "common sense" doctrine. Nor is it necessary to provide a battlefield in Missouri for a hypothetical contest between *Evans, supra,* and *Larsen, supra. See Fredericks* v. *General Motors Corp.*, 317 A.2d 494 (1974). Analysis of recent Missouri cases, including *Stevens, supra, Hays, supra, Kisner, supra, Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943 (St. Louis Ct. App. 1970) and *Giberson* v. *Ford Motor Corp.*, 504 S.W.2d 8 (Mo. 1974), supports this conclusion. The broadest interpretation which can be given is that the manufacturer should be aware of *foreseeable* consequences of misuse. Thus far there seems to have been no deviation from the elements stressed by the Missouri supreme Court in *Keener* v. *Dayton Electric Manufacturing Company,* 445 S.W.2d 362 (1969) where the case (electric sump pump improperly grounded) was reversed because of the failure of the charge to state the elements necessary to a recovery, which included proof of defective manufacture and use in a manner reasonably to be anticipated.

Therefore, since I cannot believe that on the facts of this case, the Missouri Supreme Court would depart from its stated principle that the manufacturer "is under no obligation to make the product accident proof or foolproof," *Stevens, supra,* at 346, and for all the reasons set forth by the Chief Judge, I concur.

WEBSTER, Circuit Judge, Concurring in Part and Dissenting in Part.

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The division in this panel is substantial. Judge Mehaffy would reverse because in his view the Supreme Court of Missouri would not adopt the second collision or enhanced injury doctrine in a products liability case. Judge Moore, while recognizing that a "manufacturer should be aware of *foreseeable* consequences of misuse", slip opinion at 11, would reverse because in his view the manufacturer could not possibly foresee or be held to guard against the factual circumstances of the collision and accident presented by this case.

My own view is that Missouri courts, when confronted with the issue, will adopt as the law of the state the second collision or enhanced injury doctrine as Judge Mehaffy has defined it. Slip opinion at 3. I further believe that a jury issue was presented in this case. But because I believe that the issue was tendered under a prejudicially erroneous instruction, I concur in the holding of my colleagues that the judgment must be reversed. I would, however, remand the case for a new trial; they would not.

I

In undertaking the sometimes thankless task of anticipating the predisposition of a state court on an issue of state law not yet determined, we are admonished

> * * * to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in

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direct expression or obvious implication and inference, should accordingly be given appropriate heed.

Yoder v. *Nu-Enamel Corp.*, 117 F.2d 488, 489 (8th Cir. 1941).

In 1969 the Supreme Court of Missouri embraced in its entirety the view of strict liability for defective products set forth in Restatement (Second) of Torts §402A (1965).[1] *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W.2d 362 (Mo. 1969). In succeeding years the courts of Missouri have re-enforced that commitment at every opportunity.[2] Most recently the Missouri Supreme Court extended the protection of the rule of strict liability to bystanders, thus making a complete break with any vestigial concepts of privity derived from theories of strict liability based upon warranty. *Giberson* v. *Ford Motor Co.*, 504 S.W.2d 8 (Mo. 1974).

---

1. §402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

2. Other cases expanding on *Keener* and Missouri's application of §402A include: *State ex rel. Deere and Co.* v. *Pinnell*, 454 S.W.2d 889 (Mo. 1970) (en banc) (single act long-arm statute reaches foreign manufacturer whose defective product injures user in Mis-

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It is true that pre-*Keener* cases cited in the principal and concurring opinions speak of the manufacturer as not being "an insurer", *Stevens* v. *Durbin-Durco, Inc.*, 377 S.W.2d 343, 346 (Mo. 1964), and as not "required to contemplate * * * misuse", *Hays* v. *Western Auto Supply Co.*, 405 S.W.2d 877, 884 (Mo. 1966). But these cases found their basis in the law of simple negligence and implied warranty, not strict liability, and in *Keener* the court expressly turned to the Restatement to avoid such confining concepts. 445 S.W.2d at 364.

In a post-*Keener* case the Missouri Court of Appeals held that under appropriate facts misuse may fall within the area of reasonable anticipation. In *Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. Ct. App. 1970), the court said:

> Keener, supra, directs this issue [of misuse] to be submitted in language hypothesizing the use of the article 'in a manner reasonably anticipated'. The statement to the effect defendants are not liable for injuries resulting from abnormal use is only true if such abnormal use was not reasonably

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(Footnote Continued)

souri); *Williams* v. *Ford Motor Co.*, 494 S.W.2d 678 (Mo. Ct. App. 1973) (§402A is the law of Missouri); *State ex rel. Apco Oil Corp.* v. *Turpin*, 490 S.W.2d 400 (Mo. Ct. App. 1973) (foreign manufacturer may be impleaded as third-party defendant by dealer who is sued by Missouri consumer for injuries caused by manufacturer's product); *Brissette* v. *Milner Chevrolet Co.*, 479 S.W.2d 176 (Mo. Ct. App. 1972) (defective product need not be produced before the trial court in products liability case based on breach of warranty); *Lifritz* v. *Sears, Roebuck and Co.*, 472 S.W.2d 28 (Mo. Ct. App. 1971) (no doubt that seller of defective product reasonably dangerous to user or consumer is liable for personal injuries to user or consumer); *Williams* v. *Ford Motor Co.*, 454 S.W.2d 611 (Mo. Ct. App. 1970) (contributory negligence no defense to strict liability in tort). *See also Rockett* v. *Pepsi Cola Bottling Co.*, 460 S.W.2d 737 (Mo. Ct. App. 1970).

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> foreseeable. 'The issue is one of foreseeability, and misuse may be foreseeable.' Products Liability, Frumer & Friedman, §15.01. Foreseeable use may be different from its intended use and includes any particular use which should be known to a reasonably prudent manufacturer.
>
> 457 S.W.2d at 948.

In each post-*Keener* case the Missouri courts have reaffirmed their purpose, originally stated in *Keener*, "to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Keener, supra,* at 364, *quoting Greenman* v. *Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); *see Giberson* v. *Ford Motor Co., supra,* at 9-10.

I think it is clear that Missouri law of strict liability, as expressed in *Higgins, supra,* does not depend upon a "duty" relationship, as suggested by Judge Mehaffy, but upon the presence of a defect making the product unreasonably dangerous when put to a use reasonably anticipated. In other words, the *Keener* path is not so much the path of duty but is rather a broader path which holds that "[t]he intended use doctrine necessarily includes foreseeable consequences of (unintentional) misuse". *Hoppe* v. *Midwest Conveyor Co., Inc.*, 485 F.2d 1196, 1201 (8th Cir. 1973) (applying Missouri law).

In his separate concurring opinion, Judge Moore concludes that the facts are outside the range of foreseeability. That may be, but in my view the evidence was sufficient to submit the issue to the jury. Experts testified that strap mounted tanks were in general use

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by manufacturers in 1969, when Ford designed the flange mounted tank for its 1970 Maverick, and that the use of a flange mounting caused the tank to rupture under the conditions involved in this accident. Experts testified that the roof supports were inadequately and defectively designed, causing the exit routes to be seriously impeded after the accident and thus enhancing the injuries sustained by the occupants. While the Maverick was struck from the rear by a vehicle traveling at great speed, its own speed made the relative motion impact one of 30-40 miles per hour. The evidence was that the car, while it skidded for some distance after it overturned, rolled over only once. All of the proven injuries occurred as a result of the fire and difficulty in exiting.

The District Court refused defendant's motion for directed verdict and instructed the jury on the theory of enhanced injuries caused by defects in manufacture. Our test of the sufficiency of the evidence is as follows:

> [I]n passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it.
>
> *Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960).

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Applying this test, I conclude that the evidence was sufficient to submit the case to the jury on the theory of strict liability.[3]

In submitting the case to the jury, however, the court omitted from its instructions the vital issue of foreseeability upon which the claim of liability for enhanced injury must depend. As I demonstrated above, the law of Missouri permits recovery despite misuse of the manufactured product, but only if that misuse was reasonably anticipated (*i.e.*, foreseeable) by the manufacturer. Foreseeability is a fact for the jury. While the trial court correctly instructed the jury on the other essential elements of strict liability,[4] it failed to require the jury to find that the Maverick was defective and therefore dangerous *when put to a use reasonably anticipated.* Such a finding was mandated by *Keener*

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3. The New York Court of Appeals has recently adopted a "latent defect in design" test which is to be measured against whether such defect, to the reasonably prudent manufacturer, creates a foreseeable risk of harm. *Bolm* v. *Triumph Corp.*, 33 N.Y. 2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973). Assuming without deciding that Missouri courts would apply this engraftment, the defects complained of here were not clearly obvious to the user, and there was sufficient evidence upon which to submit the issue of latency to the jury.

4. The trial court instructed the jury as follows:

> The plaintiffs must establish three essential elements in order to recover, which are as follows:
>
> First, that at the time the defendant, Ford Motor Company sold the car to its dealer, Southtown Motors, it was in a defective condition unreasonably dangerous to the consumer or user.
>
> Second, that the 1970 Ford Maverick in question was expected to and did reach the ultimate consumer without substantial change in the condition in which the defendant sold it.
>
> Third, that the defective condition in the said 1970 Ford Maverick proximately caused or contributed to cause the injury to the plaintiff, Thomas Polk, and the death of Demple Martin.

v. Dayton Electric Manufacturing Co., supra, and failure to so instruct the jury was held to be "prejudicially erroneous", requiring a new trial. 445 S.W.2d at 366.

Appellees contend that appellants failed to preserve this assignment of error, relying upon Fed. R. Civ. P. 51. I disagree. Defense counsel objected to giving any instruction on enhanced injury, contending this was not the law of Missouri. I think that objection was sufficient to preserve the point.[5] In any event, while a trial court does not commit reversible error when it assumes as true the existence of an undisputed or uncontradicted fact and omits it from its instruction, *Celatron, Inc. v. Cavic Engineering Co.*, 432 S.W.2d 794, 799 (Mo. Ct. App. 1968), the evidence at trial made foreseeability a sharply disputed factual issue.

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5. An alternative argument that the issue was not raised in a pre-trial order is likewise without merit. Some of the contested issues of fact contained in "Pre-Trial Order No. Two", filed October 25, 1972, were:

* * *

10. Whether the design, location, manufacture or assembly of the gasoline tank and/or roof supports of the 1970 Ford Maverick were defective and unreasonably dangerous for their intended purposes.

* * *

15. Whether the type of mounting referred to as flange mounting was unreasonably dangerous. Defendant denies the relevance of this as an issue.

16. Whether or not a gasoline tank which is constructed, designed, manufactured or assembled in such a manner so that there is no separating membrane between the top of the gasoline tank and the interior of the trunk is unreasonably dangerous. Defendant denies the relevance of this as an issue.

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By treating it as conceded,[6] the trial court removed the issue from the jury's consideration and thereby affected the substantial rights of the defendants in a manner inconsistent with substantial justice. *See* Fed. R. Civ. P. 61; *Edwards* v. *Mayes*, 385 F.2d 369, 373 n.1 (4th Cir. 1967) (failure to instruct that driving at excessive speed was negligence per se constituted plain error requiring reversal despite lack of adequate objection by appellants); *Mazer* v. *Lipschutz*, 327 F.2d 42 (3d Cir. 1964) (erroneous instruction on vicarious liability was plain or fundamental error requiring new trial despite appellants' failure to object thereto). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure §2558, at 672-74 n.41 (1971).[7]

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6. The trial court said to the jury:

> The second theory is that regardless of negligence that this car was defective in the particulars in which you have heard the experts testify in this case at the time that it was sold to the dealer and ultimately found its way into the hands of these people who were injured and killed in it, and that it was in the same condition in which the defendant sold it to the dealer, and that it was defective in that it subjected people in that car to unreasonable risks of injury in the event of a collision of the kind that was described in this evidence. If you don't find that that defective condition existed and the plaintiff has not convinced you of that, then on that issue your verdict should be for the defendant.

7. Since I would remand for a new trial, it is appropriate to note that I have considered the other allegations of error and with one exception consider them to be without merit. Were the case to be remanded, I would recommend that the charge on damages be refined to make more clear that the defendant can only be liable in damages for those injuries which were caused or enhanced by the defective product over and above the injuries which would have been incurred absent such alleged defects.

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The final word on enhanced injury rests of course with the Supreme Court of Missouri.[8] Yet these litigants are here, and there will be others following. For that reason, even though I agree that the judgment must be reversed, I think our exercise in prognostication deserves in this case a full exposition of our respective (and divergent) views.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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8. Ironically, the courts continue to adopt or reject the enhanced injury doctrine upon their preferences between the reasoning in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968) and the reasoning in *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). Yet neither of these diversity cases placed their reliance upon the applicable law of the respective states (Michigan and Indiana). *Passwaters v. General Motors Corp.*, 454 F.2d 1270 (8th Cir. 1972), applied the reasoning of *Larsen* to strict liability under Iowa law. Iowa, as does Missouri, follows the Restatement rule of strict liability.

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APPENDIX "C"

In The

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 73-1255

THOMAS POLK, *Appellee*,

vs.

FORD MOTOR COMPANY, *Appellant*.

No. 73-1256

ETHEL LEE MARSHALL, Guardian, *Appellee*,

vs.

FORD MOTOR COMPANY, *Appellant*.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
HONORABLE WILLIAM R. COLLINSON

PETITION FOR REHEARING IN BANC AND PETITION FOR REHEARING

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In The

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FORD MOTOR COMPANY, *Appellant.*

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
HONORABLE WILLIAM R. COLLINSON

PETITION FOR REHEARING IN BANC AND PETITION FOR REHEARING

PRELIMINARY STATEMENT

Appellees respectfully petition this Court for a rehearing in banc of its decision of October 30, 1974, in the above-entitled action.

The central issue in the case was whether the trial Court properly submitted to the jury Appellees' causes of action under the so-called "second collision or enhanced injury" doctrine under the law of Missouri. The Judges on the Panel wrote three separate opinions in deciding this issue. Their views on this subject, as expressed in their separate opinions, are far from unanimous. As Judge

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Webster noted in the opening sentence of his opinion, "The division in this Panel is substantial." (S.O. p. 11)

Judge Mehaffy concluded that the courts of Missouri would refuse to recognize recovery under the "second collision" doctrine. He agreed that this question had not yet been directly decided by any Missouri Appellate Court, but reasoned that certain decisions of Missouri courts in earlier products liability cases (not involving a second collision situation) were indicative of a conservative attitude by those courts.

Judge Moore, sitting by designation from the Second Circuit, concurred with Judge Mehaffy, but based his opinion mainly upon a "common sense" approach, concluding that under his view of the facts no court in Missouri would ever submit this case to a jury under any doctrine or theory.

On the other hand, Judge Webster, while also acknowledging that the precise issue had not been decided by the Missouri Appellate Courts, held that the Missouri courts would adopt and apply the second injury doctrine. In arriving at this conclusion, he basically relied on numerous Missouri decisions of recent date adopting the rule of strict liability in tort in products liability cases. (S.O. pp. 12-15) Judge Webster therefore holds that the submission of this case to the jury under the second injury doctrine by the Court was proper. He also observes that the evidence, particularly with regard to the speed and motion of the vehicles involved, was not so extreme as to keep this case from going to a jury. (S.O. pp. 15-16) However, Judge Webster further concludes that the case was submitted under a prejudicially erroneous instruction and therefore should be remanded for a new trial, another point which your Petitioners respectfully request be reviewed on rehearing by this Court in banc.

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ARGUMENT

A. Second Collision Doctrine

Judge Webster stated (S.O. pp. 19-20):

> "The final word on enhanced injury rests of course with the Supreme Court of Missouri. Yet these litigants are here, and there will be others following. For that reason, even though I agree that the judgment must be reversed [but not outright, only remanded because of his opinion on the instruction], I think our exercise in prognostication deserves in this case a full exposition of our respective (and divergent) views."

In other words, Judge Webster appears to suggest that this Court sitting in banc should decide the question of whether the Missouri courts would adopt and apply the second injury doctrine in a case such as the one presented herein. We agree, and for the following reasons request a rehearing by this Court in banc under the provisions of Rules 35 and 40, Federal Rules of Appellate Procedure:

1. In arriving at his decision, Judge Mehaffy misconstrued and misapplied the opinions of several Missouri courts in products liability cases, predicting a much too conservative result if the Missouri Appellate Courts were to pass on the application of the second collision doctrine, in view of the decision in *Keener* v. *Dayton Electric Manufacturing Company*, 445 S.W.2d 362 (Mo., 1969), and the numerous subsequent Missouri decisions on the subject of strict liability and products liability;

2. Because of Judge Mehaffy's misapplication and misconstruction of the Missouri law on this subject, if this decision is allowed to stand in its present posture,

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there will be a definite and direct conflict between it and this Court's decisions in *Larsen* v. *General Motors Corporation*, 391 F.2d 495 (8th Cir., 1968) and *Passwaters* v. *General Motors Corporation*, 454 F.2d 1270 (8th Cir., 1972). The approach of this Court in construing the laws of other states in those diversity cases regarding the application of the second collision doctrine should lead to the same result in the instant case, i.e., application and adoption of the second injury doctrine under the law of Missouri. In effect Judge Mehaffy applied the approach of the Seventh Circuit in *Evans* v. *General Motors Corporation*, 359 F.2d 822 (7th Cir., 1966), under the guise of a purported conservative attitude of the Missouri courts in products cases. This Court unequivocably denounced and refused to apply the *Evans* approach in *Larsen* and *Passwaters;*

3. Resolution of this issue is a matter of exceptional and extreme importance to Missouri courts and Missouri litigants. Again, we must emphasize that the matter has not as yet been decided by any Missouri Appellate Court. How can the Missouri courts and Missouri litigants be conclusively guided on the subject when there is such lack of unanimity in the opinions of the three judges who sat on the Panel in this case, and the opinions of at least two of those judges when contrasted with the unanimous opinions of other judges of this Court who rendered the decisions in *Larsen* and *Passwaters*?

Judge Mehaffy lays great stress on the decisions of the Missouri Supreme Court in *Hays* v. *Western Auto Supply Co.*, 405 S.W.2d 877 (Mo., 1966) and *Stevens* v. *Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo., 1964), both of which were decided prior to *Keener, supra.* Judge Mehaffy was

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quite impressed by the language of these cases to the effect that a manufacturer is not an insurer, is under no obligation to make products accident-proof or foolproof, has no duty to design a product so as to render it wholly incapable of producing injury, and can not be required to contemplate misuse. Judge Mehaffy lays great importance upon the approval by the Missouri Supreme Court in these pre-*Keener* cases of the leading New York case, *Campo* v. *Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

Next, Judge Mehaffy relied quite heavily on the New York case of *Edgar* v. *Nachman*, 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (1971), *Motion for Leave to Appeal Denied*, 29 N.Y.2d 483, 324 N.Y.S.2d 1029, wherein the defective design of a gasoline tank which had caught fire after a violent head-on collision was at issue, and the Court expressly rejected the second collision doctrine referring to the "New York Rule" as stated in *Campo* v. *Scofield*. Judge Mehaffy would conclude that Missouri would also apply the dictates of *Campo* v. *Scofield* through *Hays* and *Stevens* in following the *Evans* approach as opposed to *Larsen*. In so concluding, however, Judge Mehaffy erroneously misconstrued the New York law, and therefore how that law would be applied and extended in Missouri in a second collision situation, where a latent defect is involved (which is certainly the claim in the case *sub judice* as to the gas tank design and roof support design of the 1970 Maverick).

At page 7 of the Slip Opinion Judge Mehaffy recognizes the decision of *Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769 (1973) handed down by New York's highest appellate court, but entirely fails to apply it. In *Bolm* the New York Court of Appeals adopts the second collision doctrine as New York law, and limits the holding of *Campo* to situations involving open, obvious and patent manufacture or design defects. Furthermore, it overrules, the

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Edgar case relied upon by Judge Mehaffy, clearly approves the holding in *Larsen* and disapproves of the holding in *Evans,* stating that the Court in *Evans* gave too broad an interpretation of the holding in *Campo.* The Court in *Bolm* left *Campo* where it belongs, in cases involving open and obvious defects.

Likewise Judge Mehaffy's application of the holdings in *Hays* and *Stevens* was too broad. These cases both involved negligence and implied warranty actions where the alleged defect was open, obvious and patent. Of far greater importance in ascertaining the attitude of the Missouri courts in products liability cases are the decisions beginning with *Keener* in 1969 up to the present, set out in Judge Webster's opinion. (S.O. pp. 12-15) These cases clearly show an extremely broad and liberal attitude of the Missouri courts in allowing recovery to persons injured as a result of manufacture and design defects in products. This attitude is evidenced by the recent Missouri Supreme Court decision extending the protection of the rule of strict liability to bystanders. *Giberson* v. *Ford Motor Company,* 504 S.W.2d 8 (Mo., 1974). Also indicative is the language in *Higgins* v. *Paul Hardeman, Inc.,* 457 S.W.2d 943 (Mo. Ct. App., 1970) as to foreseeability of misuse. Furthermore, Missouri courts have recognized in a negligence case that the manufacturer of a vehicle designed to be used on the highway has the duty to properly design, manufacture and test it. *Clark* v. *Zuzich Truck Lines,* 344 S.W.2d 304 (Mo. Ct. App., 1961).

This Court in *Passwaters,* l.c. 1274, gave some emphasis to the fact that the Iowa Supreme Court had recognized a manufacturer's liability for negligent design in holding that second collision doctrine would be applicable in Iowa under a negligence theory. With regard to strict liability, this Court in *Passwaters* concluded, l.c.

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1277, that the Iowa courts would apply this doctrine in the second collision situation, because in adopting Restatement §402(A), Iowa relied on certain cases in California and Illinois, which had been key states in the early application of the strict liability doctrine in products cases. As stated by Judge Webster, this is exactly the situation in Missouri.

It is interesting to note that in both Iowa and Michigan (under which law the *Larsen* case was decided), the general principles of *Campo* have been recognized and applied in proper situations just as the Missouri courts did in *Hays* and *Stevens*. See *Calkins* v. *Sandven*, 129 N.W.2d 1 (Ia., 1964); *Davis* v. *Sanderman*, 282 N.W. 717 (Ia., 1938); *Fisher* v. *Johnson Milk Company*, 383 Mich. 158, 174 N.W.2d 752 (1970); *Krentz* v. *Union Carbide Corp.*, 365 F.2d 113 (6th Cir., 1966); *Warner* v. *Kewanee Machinery and Conveyer Co.*, 411 F.2d 1060 (6th Cir., 1969). Such holdings did not, however, preclude this Court from arriving at its landmark decision in *Larsen* and consistently followed with its decision in *Passwaters*. The approach and the end result should be the same in the instant case, but such will not occur unless this petition is granted.

Finally, we feel constrained to submit to this Court for consideration the recent decision in *Turcotte* v. *Ford Motor Company*, 494 F.2d 173 (1st Cir., 1974). This case involves facts and issues strikingly similar to those in the instant case. The same model and year of automobile, a 1970 Maverick, was involved. High speeds on the Massachusetts turnpike, along with a rearend collision to the 1970 Maverick, which subsequently burst into flames, were involved. The same design defect of the gas tank as in the case *sub judice* was involved in the *Turcotte* case. The question of applciation of the second collision doctrine under Rhode Island law was presented to the court for determination, and the courts of Rhode Island had not specifi-

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cally passed on that question. The majority of the court, applying *Larsen*, ruled that the courts of Rhode Island would adopt and apply the second collision doctrine in such a case, and based its decision to a great extent on Rhode Island cases adopting the theory of strict liability. But what is most interesting about this case is that Judge Moore from the Second Circuit was sitting on the Panel by designation and dissented, writing an opinion quite similar to his concurring opinion in the case *sub judice*. He even used the same analogy reference to military tanks.

Petitioner submits that Judge Moore would be disinclined to ever hold that a particular state would apply the second collision doctrine unless the courts of that state had specifically made such application in previous decisions, because his basic philosophy on the subject is that the *Evans* rationale is more logical and pragmatic than the *Larsen* rationale. (*Turcotte*, l.c. 494 F.2d 188) This fact standing alone is sufficient reason for this Court to grant this petition and rehear this appeal in banc, because it created and follows the *Larsen* rationale.

B. The Instruction Question

The portion of Judge Webster's opinion dealing with the propriety of plaintiff's verdict directing instruction on the strict liability theory clearly misapprehends the effect and scope of the "enhanced injury" doctrine enunciated in prior decisions of this Court because it would submit as a factual issue, foreseeability of automobile collisions, which is a question of law for the Court in a second collision case. The clear import of the decisions in this Circuit and elsewhere adopting this rule is that, as a matter of law, injuries sustained in automobile collisions "are readily foreseeable as an incident to the normal and expected use of an automobile." *Larsen* v. *General Motors Corporation*,

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supra at 502. Whether accepting or rejecting the rule in *Larsen*, all authorities agree that a determination of the existence or nonexistence of the duty on the part of an automobile manufacturer to design a product which is reasonably safe in a collision is a question for the Court, not the jury. In *Dreisonstok* v. *Volkswagenwerk*, 489 F.2d 1066, 1069 (4th Cir., 1974), the Court, citing both *Larsen* and *Evans*, stated:

> "The existence and nature of such a duty is a legal issue, for resolution as a matter of law. So much all the authorities agree."

In *Yetter* v. *Rajeski*, 364 F.Supp. 105, 108 (D.N.J., 1973) the District Court, although adopting the view stated in *Evans* under New Jersey law, expressed the responsibility of the Court to decide the question of *duty* as a matter of law as follows:

> "The mere fact that defendants here could logically foresee that some Volkswagons would be involved in accidents suffices, it is alleged, to require them to make those vehicles 'reasonably safe' in a collision or be made to respond in damages . . . . But does this foreseeability, in negligence terms, create a duty on the part of an automobile manufacturer to design their cars to avoid the various injuries and damages which result from such accidents? The question of imposing such a duty is, of course, not a question of fact but a question of law for the court to determine."

Judge Webster, while asserting that Missouri would adopt the "enhanced injury" doctrine as defined in *Larsen* and *Passwaters*, would reserve for the jury the question of foreseeability. In his opinion he wrote:

> "As I demonstrated above, the law of Missouri permits recovery despite misuse of the manufactured product,

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> but only if that misuse was reasonably anticipated (i.e., foreseeable) by the manufacturer. Foreseeability is a fact for the jury. While the trial court correctly instructed the jury on the other essential elements of strict liability, it failed to require the jury to find that the Maverick was defective and therefore dangerous *when put to a use reasonably anticipated*. Such a finding was mandated by Keener v. Dayton Electric Manufacturing Company, supra, and failure to so instruct the jury was held to be 'prejudicially erroneous', requiring a new trial. (Slip Opinion at 17-18)"

Judge Webster's view fails to comprehend the total impact of the judicial adoption of the rule in *Larsen* and *Passwaters* on the question of foreseeability. Those decisions impose a duty upon automobile manufacturers to guard against defective conditions unreasonably dangerous to the safety of individuals involved in automobile accidents. Indeed, the finding, as a matter of law, that collisions are foreseeable and incident to the normal and expected use of an automobile are inextricable elements of the decisions imposing such a duty. There is no question in fact that automobiles are intended to be and are normally used in circumstances making it statistically inevitable that some will be involved in collisions. As stated in *Larsen* v. *General Motors Corp.*, *supra*:

> "While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts." 391 F.2d at 502.

Foreseeability is a vital antecedent requirement for the imposition of a duty on the automobile manufacturer. In the *Dreisonstok* decision the Fourth Circuit Court of Appeals, adopting the *Larsen* rule, discussed the relationship

between foreseeability and duty and the impact of a finding of duty on the factual question of foreseeability in the following terms:

> "The mere fact, however, that automobile collisions are frequent enough to be foreseeable is not sufficient in and of itself to create a duty on the part of the manufacturer to design its car to withstand such collisions under any circumstances. Foreseeability, it has been many times repeated, is not to be equated with duty; it is after all, but one factor, albeit an important one, to be weighed in determining the issue of duty. Were foreseeability of collision the absolute litmus test for establishing a duty on the part of the car manufacturer, the obligation of the manufacturer to design a crash proof car would be absolute, a result that *Larsen* itself specifically repudiates. After all, 'nearly every accident situation [involving an automobile] no matter how bizarre, is "foreseeable" if only because in the last fifty years drivers have discovered just about every conceivable way of wrecking an automobile.'
>
> "The key phrase in the statement of the Larsen rule is '*unreasonable risk* of injury in the event of a collision', not foreseeability of collision. *The latter circumstance is assumed in collision cases under the Larsen principle;* it is the element of 'unreasonable risk' that is uncertain in such cases and on which the determination of liability or no liability will rest." 489 F.2d at 1070-71. (Emphasis supplied.)

It is clear beyond any doubt that adoption of the Larsen rule advocated by Judge Webster comprehends the finding as a matter of law that "enhanced injuries" occasioned by an unreasonably dangerous defect are foreseeable to the manufacturer. Therefore, submission of the issue of fore-

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seeability would have been improper. The trial court committed no error in withholding that factual issue and, after adopting the *Larsen* rule, correctly charged the jury as follows:

> "The defendant, Ford Motor Company, as an automobile manufacturer is under no duty to design an accident-proof vehicle, but the defendant is under a duty to use reasonable care in the design of its vehicle to avoid subjecting user to an unreasonable risk of injury in the event of a collision. Collisions with or without fault of the user are clearly foreseeable by automobile manufacturers and are statistically inevitable." (App. 160)

Furthermore, the trial court properly submitted the issue of unreasonable risk of injury under the particular factual circumstances of the accident in this case in its charge as follows:

> "The plaintiffs must establish three essential elements in order to recover, which are as follows:
>
> First, that at the time the defendant, Ford Motor Company sold the car to its dealer, Southtown Motors, it was in a defective condition unreasonably dangerous to the consumer or user." (App. 159)

Explaining the jury's duty to isolate their determination of the unreasonableness of the existing danger to the facts of the collision, the court instructed the jury that in order to return a verdict for the plaintiff they must find that the Maverick:

> "was defective in that it subjected people in that car to unreasonable risks of injury in the event of a collision of the kind that was described in this evidence." (App. 161)

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Thus, the jury was charged with and decided that under the facts of this particular accident, the design of the gas tank and the roof supports of the 1970 Maverick were unreasonably dangerous and defective. *This was the sharply disputed factual issue in the case, not foreseeability as Judge Webster observes.* (S.O. 19)

Judge Webster's reliance on *Keener* v. *Dayton Electric Manufacturing Company, supra*, for the proposition that the trial court must submit the issue of "reasonably anticipated (i.e., foreseeable) use" is misplaced. As demonstrated above, the *Larsen* rule holds as a matter of law that an automobile which is being operated on the highway, even though involved in a collision (i.e., a head-on collision as in *Larsen*), is the "normal and expected use" of such a product. 391 F.2d at 502.

Under the Missouri rule of strict liability stated in *Keener*, a manufacturer is relieved of liability only when the product is put to an abnormal use. Again we emphasize that the decisions following the rule in *Larsen* hold that the operation of a motor vehicle which is involved in a collision is as a matter of law a normal use reasonably anticipated, and the need to submit this question to the jury is obviated. See *Turcotte* v. *Ford Motor Company, supra*, holding:

> "Larsen and its progeny have recognized that the 'environment' in which cars are used, our nation's crowded, high-speed highways, makes involvement in collisions foreseeable to manufacturers as an inevitable consequence of normal use and thus imposes upon them a duty to guard against needlessly aggravated injuries." 494 F.2d at 181-2.

In *Keener* the Missouri Supreme Court required the verdict director to submit the question of the "reasonably

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anticipated" or "normal" use to the jury because there had been no determination of that issue as a matter of law. The distinction is obvious. In automobile cases it can not be said that reasonable men could differ as to whether collisions occasioned by the use of the product can be reasonably anticipated. Contrariwise, *Keener* involved an injury resulting from electric shock to an individual using a sump pump to drain a basement. With the pump plugged into an electric outlet, the decedent standing ankle-deep in water with no rubber gloves or rubber boots attempted to lift the pump and was electrocuted. The pump was not equipped with a ground wire or overload protector, and the plaintiff contended, therefore, that there was a defect in the design of the product and the defendant maintained that it was being put to an abnormal use. Obviously there was a substantial question of fact upon which reasonable men could differ concerning the foreseeability of injury from use of the pump in this manner. However, if the rule in *Larsen* is to be followed, there was no substantial question of fact concerning the foreseeability of injury from automobile collisions; indeed, the Court must find such injuries to be statistically inevitable. Therefore, the Court properly resolved the issue of foreseeability as a matter of law and properly withheld the question from the jury.

Finally it should be noted that the appellant failed to make a specific objection to the Court's instructions in violation of F.R.C.P. 51. Judge Webster held that the appellant's general objection to the giving of any instruction on enhanced injury, on the contention that this was not the law of Missouri, was sufficient. We disagree. The Supreme Court has said in this regard:

> "In fairness to the trial court and the parties, objections to the charge must be sufficiently specific to bring into

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> focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial . . . ." *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1942).

Therefore, it is clear that Judge Webster misapplied Rule 51 in reaching this question. However, for broader reasons stated above, the treatment of this issue is unnecessary since the trial court properly and lawfully charged the jury on the strict liability theory.

C. Rehearing by the Panel

In the alternative to suggesting that this appeal should be reheard by this Court in banc, Appellees respectfully move that the Panel rehear this case for all the reasons set out hereinabove.

CONCLUSION

Rehearing of this appeal by the Court in banc is essential to preserve the uniformity of this Court's decisions approving the Second Collision Doctrine, especially considering that the first instance in which a court allowed liability in an enhanced injury case was in *Larsen*. Of equal importance is the impact the decision herein will have on Missouri Courts and Missouri Litigants. On a question of such exceptional importance, to paraphrase Judge Webster, the prognostication of the Missouri law on this question deserves a full exposition of the respective (and divergent) views of the judges on this Panel. This can only be accomplished by rehearing by this Court in banc.

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Close scrutiny should also be given by the Court in banc to the Trial Court's charge to the jury, which for the reasons stated above, should be allowed to stand. This case was tried at great expense to all concerned and submitted in November, 1972. To send it back for re-trial over two years later (and over five years after the occurrence in question) should only be for the most compelling of reasons. Again, we emphasize that no specific objection was made to the Trial Court's charge by defendant, and particularly the portion thereof singled out as prejudicially erroneous by Judge Webster.

Therefore, the Petition should be granted, and this Court in banc should uphold the judgment of the Trial Court in every respect.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1974

73-1255
Thomas Polk,
Appellee,
vs.
Ford Motor Company,
Appellant.

73-1256
Ethel Lee Marshall, Guardian,
Appellee,
vs.
Ford Motor Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Appellees' petition for rehearing en banc has been considered by the court and is granted. The clerk of this court is directed to set these appeals for oral argument and submission to the court en banc at the session to be held in St. Louis, Missouri, the week of January 6, 1975.

November 22, 1974

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APPENDIX "D"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Nos. 73-1255 and 73-1256

No. 73-1255
Thomas Polk,
Appellee,
v.
Ford Motor Company,
Appellant.

No. 73-1256
Ethel Lee Marshall, Guardian,
Appellee,
v.
Ford Motor Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: January 8, 1975
Filed: January 9, 1976

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Before LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and WEBSTER, Circuit Judges.

WEBSTER, Circuit Judge.

Once again this Court is called upon to forecast whether a state (this time Missouri) would apply the "second collision" or "enhanced injury" doctrine to a products liability case within its jurisdiction. A divided panel[1] reversed a judgment in favor of plaintiffs, and this Court, deeming the issue to be of significance, reheard the case en banc.

The operative facts are well established by the record. On October 9, 1969, Thomas Polk was driving a 1970 Ford Maverick at approximately 45 to 50 miles per hour on Interstate 70 in Kansas City, Missouri. His passenger was Demple Martin. A car driven by Edward Farage in the same direction at a rate of speed estimated to be 90 to 100 miles per hour struck the Maverick at its right rear section, causing it to jump a nine-inch curb and strike a concrete retaining wall dividing the eastbound and westbound lanes. The Maverick rebounded from the retaining wall, overturned, and slid on its roof approximately 100 feet before coming to rest. The roof supports collapsed and the car burst into flames. Polk, who was thrown partially outside the car at the rear window on the driver's side, observed gasoline flowing toward him from the rear of

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1. Chief Judge Mehaffy was of the opinion that Missouri would not adopt the doctrine in a products liability case. Senior Judge Leonard P. Moore of the Second Circuit, sitting by designation, thought that the manufacturer could not possibly foresee or be held to guard against the factual circumstances of the collision and accident presented by this case. Judge Webster was of the view that Missouri would extend the law of strict liability to reach the facts presented.

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the automobile. He was able to extricate himself from the automobile through the window. The serious burns which he suffered in the process were his only injuries. Martin was pinned in the Maverick and burned to death.

Polk and Ethel Marshall, the guardian of Demple Martin's minor children, each filed suit in the United States District Court for the Western District of Missouri against Ford Motor Company, the manufacturer of the 1970 Maverick.[2] The complaints alleged negligence in the design of the 1970 Maverick, breach of warranty of merchantability, and strict liability in tort. The case was ultimately submitted to the jury on the theory of negligent failure to design and test and on the theory of strict liability which incorporated the "second collision" or "enhanced injury" concept, following rejection by the District Court of Ford's motion for a directed verdict. Following a jury verdict awarding $200,000 to Polk and $50,000 to Marshall as guardian, Ford filed alternative motions for judgment notwithstanding the verdict and for new trial, which were overruled.[3]

The evidence at trial revealed that the 1970 Maverick used a flange-mounted fuel tank which was an integral part of the automobile's structure, its top constituting the floor of the trunk. In 1969, the year the 1970 Maverick was manufactured, all other American-made cars, excepting only Ford's low-priced compact models, used a strap-mounted fuel tank which

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2. Jurisdiction was based upon diversity of citizenship and an amount in controversy exceeding $10,000. *See* 28 U.S.C. §1332. The suits were subsequently consolidated for trial.

3. An alternative motion for a credit of $10,000 against Polk's judgment was granted, and no cross-appeal was taken by Polk.

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was attached to the underbody of the car and was not an integral part of the car's structure. It was plaintiffs' contention that the flange-mounted fuel tanks were rigid on impact and more likely to produce a fire or explosion on impact from the rear, and that the collapsed roof supports contributed to the injuries of Polk and death of Martin by obstructing escape. In other words, the plaintiffs contended that the 1970 Maverick was unreasonably dangerous to the user.

The injuries complained of did not occur until after the Maverick had come to rest, upside down, and caught fire. Thus, the issue presented for decision is whether Ford may be liable to plaintiffs under the "second collision" or "enhanced injury" doctrine. On appeal, Ford contends that it was error to submit the case to the jury on this theory because (1) liability thereunder is not in accord with the law of Missouri and (2) there was insufficient evidence of defective design. Ford further contends that the instructions were prejudicially erroneous. Additional trial errors are also asserted. We reject these contentions and affirm the judgment of the District Court.[4]

I

Application of the Enhanced Injury Doctrine in Missouri

In undertaking the sometimes thankless task of anticipating the predispositions of a state court on an issue of state law not yet determined, we are admonished

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4. The Honorable William R. Collinson, United States District Judge for the Western District of Missouri.

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> • • • to have regard for any persuasive data that is available, such as compelling inferences or logical implications from other related adjudications and considered pronouncements. The responsibility of the federal courts, in matters of local law, is not to formulate the legal mind of the state, but merely to ascertain and apply it. Any convincing manifestation of local law, having a clear root in judicial conscience and responsibility, whether resting in direct expression or obvious implication and inference, should accordingly be given appropriate heed.

Yoder v. *Nu-Enamel Corp.*, 117 F.2d 488, 489 (8th Cir. 1941).

The second collision doctrine, enhanced injury doctrine, or defect-enhancing doctrine, as it is variously called, is the legal concept which imposes liability based on the construction or design of a product which causes enhanced or greater injuries in the course of or following an initial accident or collision brought about by some independent cause. The landmark decision *Larsen* v. *General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), adopted the enhanced liability doctrine in a Michigan diversity case and held:

> The intended use and purpose of an automobile is to travel on the streets and highways, which travel more often than not is in close proximity to other vehicles and at speeds that carry the possibility, probability, and potential of injury-producing impacts. The realities of the intended and actual use are well known to the manufacturer and to the public and these realities should be squarely faced by the manufacturer and the courts. We perceive of no sound reason, either in logic or

> experience, nor any command in precedent, why the manufacturer should not be held to a reasonable duty of care in the design of its vehicle consonant with the state of the art to minimize the effect of accidents. The manufacturers are not insurers but should be held to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel.

391 F.2d at 502-03.

A growing number of courts have adopted the enhanced liability doctrine,[5] but other courts have either rejected or restricted its application.[6] The quantum of opposing cases alone does not aid our inquiry since (1)

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5. *Nanda* v. *Ford Motor Co.*, 509 F.2d 213 (7th Cir. 1974) (Illinois law); *Turcotte* v. *Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974) (Rhode Island law); *Ford Motor Co.* v. *Zahn*, 265 F.2d 729 (8th Cir. 1959) (Minnesota law); *Grundmanis* v. *British Motor Corp.*, 308 F. Supp. 303 (E.D. Wis. 1970) (Wisconsin law); *Dyson* v. *General Motors Corp.*, 298 F. Supp. 1064 (E.D. Pa. 1969) (Pennsylvania law); *Cronin* v. *J.B.E. Olson Corp.*, 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); *Friend* v. *General Motors Corp.*, 118 Ga. App. 763, 165 S.E.2d 734 (1968); *Frericks* v. *General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975); *Johnson* v. *American Motors Corp.*, 225 N.W.2d 57 (N.D. 1974); *Mickle* v. *Blackmon*, 252 S.C. 202, 166 S.E.2d 173 (1969); *Arbet* v. *Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431 (1975); *cf. Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973) (defect must be latent).

6. *Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966) (Indiana law); *Walker* v. *International Harvester Co.*, 294 F. Supp. 1095 (W.D. Okla. 1969) (Oklahoma law); *Shumard* v. *General Motors Corp.*, 270 F. Supp. 311 (S.D. Ohio 1967) (Ohio law); *Willis* v. *Chrysler Corp.*, 264 F. Supp. 1010 (S.D. Tex. 1967) (Texas law); *Kahn* v. *Chrysler Corp.*, 221 F. Supp. 677 (S.D. Tex. 1963) (Texas law); *Rogers* v. *Ford Motor Co.*, 191 So.2d 713 (La. App. 1966); *Keahl* v. *General Motors Corp.*, CCH Products Liability Reporter ¶¶5995, 6042 (Mich. Cir. Ct. 1968); *Walton* v. *Chrysler Motor Corp.*, 229 So.2d 568 (Miss. 1969); *Snipes* v. *General Motors Corp.*, CCH Products Liability Reporter ¶6037 (Ohio C.P. 1968); *Murphy* v. *Plymouth Motor Corp.*, 3 Wash.2d 180, 100 P.2d 30 (1940).

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some of the cases cited have rejected the doctrine as applied to the particular facts before them and (2) some have considered the doctrine under various theories of recovery, *i.e.*, common law negligence, breach of implied warranty, and strict liability in tort.[7] The critical issue in negligence cases is whether the manufacturer has a duty to design its cars so that injuries to occupants involved in accidents will not be enhanced because of some defect in the automobile. Courts rejecting the theory have usually done so by declining to impose a duty to design against enhancing injuries and declaring (1) the particular collision was not reasonably foreseeable by the manufacturer or (2) a collision is not a use for which the auto was intended.[8]

In 1969, the Supreme Court of Missouri embraced the view of strict liability in its entirety for defective products set forth in Restatement (Second) of Torts §402A (1965).[9] *Keener* v. *Dayton Electric Manufacturing Co.*, 445 S.W.2d 362, 364 (Mo. 1969). In succeeding

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7. Cases are collected in Annot., 42 A.L.R.3d 560 (1972). *See also, for example, Volkswagen of America, Inc.* v. *Young*, 272 Md. 201, 321 A.2d 737 (1974), holding the strict liability theory of Restatement (Second) of Torts §402A inappropriate in a design defect situation.

8. *E.g., Evans* v. *General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966); *Campo* v. *Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950). *Evans* has been criticized by both the commentators and the courts, *see Dyson* v. *General Motors Corp.*, 298 F. Supp. 1064, 1067 n.4 (E.D. Pa. 1969), and *Larsen* v. *General Motors Corp.*, 391 F.2d 495, 498-99 (8th Cir. 1968).

9. §402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

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years the courts of Missouri have reinforced that commitment at every opportunity.[10] Most recently, the Missouri Supreme Court extended the protection of the rule of strict liabiilty to bystanders, thus making a complete break with any vestigial concepts of privity derived from theories of strict liability based upon warranty. *Giberson* v. *Ford Motor Co.*, 504 S.W.2d 8 (Mo. 1974).

It is true that some pre-*Keener* cases speak of the manufacturer as not being "an insurer", *Stevens* v.

(Footnote Continued)

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

10. Other cases expanding on *Keener* and Missouri's application of §402A include: *State ex rel. Deere & Co.* v. *Pinnell*, 454 S.W.2d 889 (Mo. 1970) (en banc) (single act long-arm statute reaches foreign manufacturer whose defective product injuries user in Missouri); *Williams* v. *Ford Motor Co.*, 494 S.W.2d 678 (Mo. App. 1973) (§402A is the law of Missouri); *State ex rel. Apco Oil Corp.* v. *Turpin*, 490 S.W.2d 400 (Mo. App. 1973) (foreign manufacturer may be impleaded as third-party defendant by dealer who is sued by Missouri consumer for injuries caused by manufacturer's product); *Brissette* v. *Milner Chevrolet Co.*, 479 S.W.2d 176 (Mo. App. 1972) (defective product need not be produced before the trial court in products liability case based based on breach of warranty); *Lifritz* v. *Sears, Roebuck and Co.*, 472 S.W.2d 28 (Mo. App. 1971) (seller of defective product reasonably dangerous to user or consumer is liable for personal injuries to user or consumer); *Williams* v. *Ford Motor Co.*, 454 S.W.2d 611 (Mo. App. 1970) (contributory negligence no defense to strict liability in tort). *See also Rockett* v. *Pepsi Cola Bottling Co.*, 460 S.W.2d 737 (Mo. App. 1970).

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Durbin-Durco, Inc., 377 S.W.2d 343, 346 (Mo. 1964), and as not "required to contemplate * * * misuse", *Hays* v. *Western Auto Supply Co.*, 405 S.W.2d 877, 884 (Mo. 1966). But these cases found their basis in the law of simple negligence and implied warranty, not strict liability, and in *Keener* the court expressly turned to the Restatement to avoid such confining concepts. 445 S.W.2d at 364.

In a post-*Keener* case, the Missouri Court of Appeals held that under appropriate facts *misuse* may fall within the area of reasonable anticipation. In *Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943, 948 (Mo. App. 1970), the court said:

> Keener * * * directs this issue [of misuse] to be submitted in language hypothesizing the use of the article "in a manner reasonably anticipated". The statement to the effect defendants are not liable for injuries resulting from abnormal use is only true if such abnormal use was not reasonably foreseeable. "The issue is one of foreseeability, and misuse may be foreseeable." Products Liability, Frumer & Friedman, §15.01. Foreseeable use may be different from its intended use and includes any particular use which should be known to a reasonably prudent manufacturer.

In each post-*Keener* case, the Missouri courts have reaffirmed their purpose, originally stated in *Keener*, "to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Keener, supra*, 445 S.W.2d at 364, *quoting Greenman* v. *Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962);

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see Giberson v. *Ford Motor Co., supra,* 504 S.W.2d at 9-10.

We think it is clear that under Missouri law of strict liability, as expressed in *Higgins, supra,* the critical element is the presence of a defect making the product unreasonably dangerous when put to a use reasonably anticipated. In other words, the *Keener* path is not so much the path of "duty" but is rather a broader path which holds that "[t]he intended use doctrine necessarily includes foreseeable consequences of (unintentional) misuse". *Hoppe* v. *Midwest Conveyor Co.,* 485 F.2d 1196, 1201 (8th Cir. 1973) (applying Missouri law).

Applying these principles espoused by the Missouri courts, we have no difficulty in concluding that under Missouri law a manufacturer may be held liable for those injuries shown to have been caused or enhanced by a defective condition of a product which was being used in a manner reasonably anticipated in the course of or following an initial accident brought about by some independent cause.

II

Sufficiency of the Evidence

The District Court refused Ford's motion for directed verdict and instructed the jury on the theory of enhanced injuries caused by defects in manufacture or design. Appellant contends that even if Missouri would recognize the second collision or enhanced injury doctrine, the evidence was insufficient to submit the case to the jury on this theory. Specifically, appellant contends that there was no evidence from which a jury could find that the 1970 Maverick was defectively de-

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signed in light of the "state of the art" in 1969. *See Larsen* v. *General Motors Corp., supra,* 391 F.2d at 502-03.

Experts testified that strap-mounted tanks were in general use by manufacturers in 1969 when Ford designed the flange-mounted tank for the 1970 Maverick, and that the use of a flange mounting caused the tank to rupture under the conditions involved in this accident. It was conceded that strap mounting could have been used for the installation of the fuel tank on the 1970 Maverick involved in the accident. Experts testified that the roof supports were inadequately and defectively designed, causing the exit routes to be seriously impeded after the accident and thus enhancing the injuries sustained by the occupants. While the Maverick was struck from the rear by a vehicle traveling at great speed, its own speed made the relative motion impact one of 30-40 miles per hour. The evidence was that the car, while it skidded for some distance after it overturned, rolled over only once. There was substantial evidence that all of the proven injuries occurred as a result of the fire and difficulty in exiting.

Our test of the sufficiency of the evidence is as follows:

> [I]n passing upon the motion for judgment, the trial court and this court are (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably

be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it.

Hanson v. *Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960). Applying this test, we conclude that the evidence was sufficient to submit the case to the jury on the doctrine of enhanced injury.[11]

III

The Instructions

Appellant contends next that the instructions to the jury were prejudicially erroneous in that, contrary to the law of Missouri, the instructions permitted the jury to award damages for *all* of the injuries suffered in the accident and not merely the enhanced injuries due to the defect in manufacture. Appellant argues (1) that the court's instruction did not require the jury to determine "what injuries to plaintiff and plaintiff's decedent were attributable to the alleged design defects in the 1970 Maverick" and (2) that appellant and the driver of the other automobile were treated as joint tortfeasors by the language of the instruction which allowed recovery of damages which "were proximately caused or contributed to be caused" by the defective condition of the automobile.

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11. The New York Court of Appeals has recently adopted a "latent defect in design" test under which the question is whether such defect, to the reasonably prudent manufacturer, creates a foreseeable risk of harm. *Bolm* v. *Triumph Corp.*, 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973). Assuming without deciding that Missouri courts would apply this engraftment, the defects complained of here were not clearly obvious to the user, and there was sufficient evidence upon which to submit the issue of latency to the jury.

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The instructions, read in context and as a whole, do not permit such latitude to the jury. The District Court charged the jury:

> Plaintiffs do not contend that defendant in any way caused or contributed to cause the vehicles to collide. However, plaintiffs do contend that once the collision occurred, that the design features of the fuel tank and roof supports of the Maverick, which plaintiff Polk was driving, caused the plaintiffs to experience damages which they would not have sustained had the vehicle's designed feature of which they complained not existed.
>
> Accordingly, plaintiffs must prove by a preponderance of the evidence that the design of the fuel tank and roof supports was defective, and that *said defects caused them to sustain damages which they would not have sustained except for that design.*
>
> If you find that the defective condition of the automobile by the defendant has been established, you will then determine whether such defective condition was the proximate cause of the injury and damages complained of, for even if a defective condition of the automobile on the part of the defendant is established, *there can be no recovery by the plaintiffs unless it appears that the injuries and damage complained of were proximately caused or contributed to be caused by the act or acts constituting the defective condition of the automobile.*
>
> A proximate cause is one that necessarily sets in operation the factors which accomplish the damage complained of. *The plaintiffs must prove that the damages claimed were the direct result of the*

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design features claimed and that the fire and resulting damages would not have occurred except for the design features claimed.

This does not mean the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing or the conduct of only one person. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage, and in such a case, each may be the proximate cause. (emphasis added)

The appellees observe correctly that the negligent driver of the other car was a joint tortfeasor with Ford in respect to the enhanced injuries since there was no sufficient intervening cause to limit the driver's liability. On the other hand, Ford was not a joint tortfeasor in respect to any damages occurring prior to the fire; it is only the *enhanced* injuries for which Ford may be held liable in this case. *Larsen* v. *General Motors Corp., supra,* 391 F.2d at 503; *see Passwaters* v. *General Motors Corp.,* 454 F.2d 1270, 1273-74 (8th Cir. 1972).

We think a fair reading of the instruction quoted above is that there may be recovery only for those injuries which were caused by the defective design and which would not have been sustained but for the design. The "contributed to be caused" language merely gives recognition to the fact that acts by others could set in motion a chain of circumstances under whichk the defective condition might produce or cause the enhanced injuries. The evidence was such that the jury could properly have found that all of the injuries were suffered after the car came to rest upon its roof and caught fire.

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A more troublesome attack upon the instructions is found in appellant's argument that the District Court failed to require the jury to find, as a condition precedent to liability, that at the time of the injuries the 1970 Maverick was being used "in a way it was intended to be used." This is not a correct statement of the law of Missouri. *See* Point I, *supra*. The law of Missouri permits recovery despite unintentional misuse of the manufactured product, but only if that misuse could reasonably have been anticipated (foreseen) by the manufacturer.[12] While the District Court correctly instructed the jury on the other essential elements of strict liability,[13] it did not in express terms require the jury to find that the Maverick was defective and therefore dangerous *when put to a use reasonably anticipated*. Such a finding was mandated by *Keener* v. *Dayton Electric Manufacturing Co.*, *supra*, 445 S.W.2d at 366, and failure to so instruct the jury was held to be "prejudicially erroneous", requiring a new trial.

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12. In *Passwaters* v. *General Motors Corp.*, 454 F.2d 1270, 1275 n.3 (8th Cir. 1972), applying Iowa law, we said: "The Fourth Circuit has cogently observed that 'intended use' is simply a convenient adaptation of the test of reasonable foreseeability. Gardner v. Q.H.S., Inc., 448 F.2d 238 (4 Cir. 1971)."

13. The District Court instructed the jury as follows:

> The plaintiffs must establish three essential elements in order to recover, which are as follows:
>
> First, that at the time the defendant, Ford Motor Company sold the car to its dealer, Southtown Motors, it was in a defective condition unreasonably dangerous to the consumer or user.
>
> Second, that the 1970 Ford Maverick in question was expected to and did reach the ultimate consumer without substantial change in the condition in which the defendant sold it.
>
> Third, that the defective condition in the said 1970 Ford Maverick proximately caused or contributed to cause the

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In a second collision case under Missouri law, the element of foreseeability (reasonable anticipation) of misuse, becomes more significant. The manufacturer is entitled to have a jury consider whether or not the factors which precipitated the accident and injuries were of such nature that the manufacturer should reasonably have anticipated, at least in general terms, such use of the automobile under such circumstances.[14] While a Missouri court has held that a manufacturer may be held in strict liability for the *foreseeable* consequences of misuse,[15] we find no support for the proposition that *any* collision is foreseeable or that *any* misuse will automatically be covered without reference to its foreseeability. For example, a manufacturer cannot be held liable for producing a car which will not withstand a fall from a cliff. It is the test of "reasonably anticipated" applied in *Keener* which keeps the application of strict liability in second collision situations from making the manufacturer an absolute insurer and thus producing an absurd and unjust result. Whether or not the "use"

(Footnote Continued)

injury to the plaintiff, Thomas Polk, and the death of Demple Martin.

14. In *Eshbach* v. *W. T. Grant's & Co.*, 481 F.2d 940, 943 (3rd Cir. 1973), the court said:

> In actions brought pursuant to §402A, "[t]he duty of a manufacturer or supplier is limited to foreseeing the probable results of the normal use of the product or a use which can be reasonably anticipated." *Kaczmarek* v. *Mesta Machine Company*, 463 F.2d 675 at 679 (3d Cir. 1972). Thus, the proper limits of responsibility for the defendant-seller here is whether the "use" to which the product was put was intended or foreseeable (objectively reasonable) by the defendant.

15. *Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. App. 1970); *see Hoppe* v. *Midwest Conveyor Co.*, 485 F.2d 1196, 1201 (8th Cir. 1973).

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involved in this case was a reasonably anticipated one was sharply disputed by the parties.

When the instruction was offered without the *Keener* language, however, Ford made only a blanket objection that the instruction was not the law of Missouri. Fed. R. Civ. P. 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating *distinctly* the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." (emphasis added). The form of objection could hardly be said to be "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman,* 318 U.S. 109, 119 (1943). *See* 9 C. Wright & A. Miller, Federal Practice and Procedure §2554 (1971), and cases cited therein. We therefore examine the instruction to see whether the plain error rule applies. *See* Fed. R. Civ. P. 51; *O'Malley* v. *Cover,* 221 F.2d 156, 159 (8th Cir. 1955). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure §2558, at 672 (1971).

In *Keener,* only the theory of strict liability was submitted to the jury. In this case, the issue of negligent failure to test and detect design defects in the flange-type assembly was also submitted to the jury. In its verdict directing instruction on this issue, the court did impose a requirement that the automobile be "unreasonably dangerous *under foreseeable conditions*" (emphasis added). In describing the theory of strict liability, the court explained plaintiffs' contention that the 1970 Maverick was defective "in that it subjected people in that car to unreasonable risks of injury *in the event of a collision of the kind that was described in this evidence.*" (emphasis added). The court then said:

"If you don't find that that defective condition existed and the plaintiff has not convinced you of that, then on that issue your verdict should be for the defendant."

We think this instruction, while it did not use the precise *Keener* terminology, required the jury to assess whether the automobile was unreasonably dangerous under the circumstances of the accident, that is to say, whether it was defective and therefore dangerous when put to a use reasonably anticipated.[16] "Unreasonable risk", as used in *Larsen* and in the District Court's

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16. *See* Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 14-15 (1965):

> Section 402A of the *Restatement* sets forth two requirements for liability—that the product be "in a defective condition" and that it be "unreasonably dangerous." The requirement of a defective condition is easily understandable in the usual situation in which a particular article has something wrong with it. Because of a mistake in the manufacturing process, for example, the product was adulterated or one of its parts was broken or weakened or not properly attached, and it did not function as expected. If this occurs, there is no need of proving fault in letting it come to be in that condition. But a defect may be only a minor one, and the *Restatement* indicates that strict liability is not to be imposed unless it makes the product unreasonably dangerous.
>
> The more difficult problem arises with a product which was made in the way it was intended to be made and in the condition planned and which yet proves to be dangerous. Is such an article defective? Perhaps it can be said to be improperly designed, and the bad design may be called a defect. But then the design is "defective" only because it made the product unreasonably dangerous. Or what of a product to which a certain number of people are allergic. Is it defective? This too depends upon whether it is unreasonably dangerous. In cases of this general type the phrase "defective condition" has no independent meaning, and the attempt to use it is apt to prove misleading. The only real problem is whether the product is "unreasonably dangerous," because "defective condition," if it is to be applied at all, depends on that. Strict liability is appropriate for these cases, and it would be better in them not to refer to any requirement of defectiveness. As a matter of fact, even in the first type of cases in which the article was defective because of something that went wrong in

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instruction read as a whole, is a term which permits the jury to take into account the improbability of the circumstances in assessing the responsibility of the manufacturer to provide reasonable safeguards against injury under such circumstances.[17] Thus viewed, we cannot say that the instructions given require the application of the plain error rule.[18]

IV

Other Trial Errors

We have considered other assignments of trial error and find them to be without merit.

A.

Appellant contends that the District Court erred in permitting plaintiffs' counsel to cross-examine its expert witness with respect to model changes which oc-

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(Footnote Continued)

the manufacturing process, the true problem in the end is whether that defect makes the product unreasonably dangerous. (footnotes omitted)

17. As the Fourth Circuit recognized in *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073 (4th Cir. 1974): "Moreover, in a 'crashworthy' case, it is necessary to consider the circumstances of the accident itself."

18. The author of this opinion, while dissenting from the panel opinion rejecting the second collision doctrine under Missouri law, originally thought that failure to follow the *Keener* formulation in haec verbae mandated reversal. (*See* the dissenting opinion of Judge Ross.) No other Missouri courts have so held, and this Circuit has declined the opportunity to do so. *See Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943, 946 n.1 (Mo. App. 1970); *Maryland Casualty Co.* v. *Dondlinger & Sons Construction Co.*, 420 F.2d 1368, 1371 (8th Cir. 1970). A more careful consideration of the full instructions convinces him that no manifest injustice has occurred as a result of such variances and that the jury did have an opportunity to consider the "use" involved in terms which did not make the manufacturer of the automobile an insurer against all injury.

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curred in Mavericks manufactured subsequent to the 1970 model. The District Court had ruled in advance that testimony could be received which showed Ford had ceased using flange-mounted fuel tanks in favor of strap-mounted tanks because "it would be a question of they had gone back to a prior type and had abandoned this type and that might very possibly be considered probative evidence that their experience with the flange-mounted tank was unsatisfactory, and I think it's a proper subject for cross-examination of an expert witness." Faced with this ruling, which we think was within the trial court's discretion,[19] defense counsel elected to bring out the fact that flange mounting had been discontinued, and plaintiffs' counsel in cross-examination pursued the subject thus opened to establish that Ford had returned to the strap-mounted design. Objections to such testimony, even if meritorious, were thereby waived.

B.

Appellant contends that plaintiffs' expert witnesses should not have been permitted to express their opinions on the defective nature of the roof supports because there were no facts in evidence nor an independent investigation upon which such an opinion could be based. There must, of course, be sufficient facts already in evidence or disclosed by the witness as a result of his investigation to take such testimony out of the realm of guesswork and speculation. *Gilbert* v. *Gulf Oil Corp.*, 175 F.2d 705, 709 (4th Cir. 1949). *See* Fed. R. Evid. 703.

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19. See Fed. R. Evid. 407.

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In this case, experts testified for plaintiffs that the roof supports were defective and caused or contributed to cause the injuries by making escape difficult by collapsing. They based their opinions in part on the evidence that the automobile rolled over only once; other factors were considered which need not be repeated here. The qualification of experts and the admissibility of their opinions lies in the sound discretion of the District Court. *Lakota Girl Scout Council, Inc.* v. *Havey Fund-Raising Management, Inc.*, 519 F.2d 634, 642 (8th Cir. 1975); *Gisriel* v. *Quinn-Moore Oil Corp.*, 517 F.2d 699, 701-02 (8th Cir. 1975). Indeed, the newly adopted Federal Rules of Evidence make it clear that an expert may give his conclusions without prior disclosure of the underlying facts. Fed. R. Evid. 705. The weakness in the underpinnings of such opinions may be developed upon cross-examination and such weakness goes to the weight and credibility of the testimony. We have reviewed the testimony complained of and find appellant's contention to be without merit. We also reject appellant's additional contention that the court erred in permitting the experts to testify concerning other accidents involving flange-mounted fuel tanks on 1970 Mavericks. Such testimony was used to establish the experience of the experts under substantially similar circumstances. Again, the weight of such testimony was for the jury, and the trial court did not abuse its discretion in permitting it in evidence.

C.

We have considered the remaining contentions and find them likewise to be without merit. The use of a six-person jury in federal court under local rule was expressly approved in *Colgrove* v. *Battin*, 413 U.S. 149 (1973); procedural matters are governed under federal

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law. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). Upon a full review of the record, we discern no accumulation of errors which in the aggregate prevented appellants from receiving a fair trial.

The judgment is affirmed.

ROSS, Circuit Judge, Concurring in part and Dissenting in part.

I concur in all of Judge Webster's opinion except his determination that the failure to give the proper instructions did not constitute plain error.

I agree that *Keener* v. *Dayton Electric Manufacturing Co., supra*, mandates the giving of instructions requiring the jury to find that the Maverick was defective and therefore dangerous when put to a use reasonably anticipated. As Judge Webster points out, the failure to give such an instruction was held to be prejudicially erroneous in *Keener*.

In the original opinion Judge Webster filed a dissent in which he included the following paragraph:

> Appellees contend that appellants failed to preserve this assignment of error, relying upon Fed. R. Civ. P. 51. I disagree. Defense counsel objected to giving any instruction on enhanced injury, contending this was not the law of Missouri. I think that objection was sufficient to preserve the point. In any event, while a trial court does not commit reversible error when it assumes as true the existence of an undisputed or uncontradicted fact and omits it from its instruction, *Celatron, Inc.* v. *Cavic Engineering Co.*, 432 S.W.2d 794, 799 (Mo. Ct. App. 1968), the evidence at trial made foreseeability a sharply disputed factual issue. By treating it as conceded, the trial

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court removed the issue from the jury's consideration and thereby affected the substantial rights of the defendants in a manner inconsistent with substantial justice. *See* Fed. R. Civ. P. 61; *Edwards* v. *Mayes*, 385 F.2d 369, 373 n.1 (4th Cir. 1967) (failure to instruct that driving at excessive speed was negligence per se constituted plain error requiring reversal despite lack of adequate objection by appellants); *Mazer* v. *Lipschutz*, 327 F.2d 42 (3d Cir. 1964) (erroneous instruction on vicarious liability was plain or fundamental error requiring new trial despite appellants' failure to object thereto). *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure, §2558, at 672-74 n. 41 (1971). (Footnotes omitted.)

I consider that paragraph to be a proper statement of the law; that the failure to give the proper instruction was plain error; that the alternative instructions stressed by Judge Webster in this opinion do not cure that plain error in that they fail completely to refer to a "use reasonably anticipated" by the manufacturer.

I would reverse and remand for a new trial for the reasons stated in Judge Webster's original dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "E"

In The

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 73-1255

THOMAS POLK, *Appellee*,

vs.

FORD MOTOR COMPANY, *Appellant*.

No. 73-1256

ETHEL LEE MARSHALL, Guardian, *Appellee*,

vs.

FORD MOTOR COMPANY, *Appellant*.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
HONORABLE WILLIAM R. COLLINSON

SECOND PETITION FOR REHEARING EN BANC

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JAN 30 1975

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Argument—

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II. The Court En Banc Completely Disregarded the Absence of Any Support, Either Factual or Through Independent Investigation, for Plaintiff's Expert Opinion Testimony That the Roof Supports of the 1970 Maverick Were Defectively Designed 3

III. The Court En Banc Disregarded the Absence of Any Evidence in Support of Expert Testimony That the Roof Supports Were Defectively Designed and As to the Cause of Injury or Death of Demple Martin in Holding That There Was Sufficient Evidence to Submit Plaintiff's Case to the Jury 5

IV. The Court En Banc Misapprehended Federal Rule 51 and the Doctrine of Plain Error in Holding That the Trial Court's Failure to Properly Charge the Jury in Accordance With Keener v. Electric Mfg. Co. Was Not Prejudicially Erroneous 6

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SECOND PETITION FOR REHEARING EN BANC

Ford Motor Company, Appellant, in Cases No. 73-1255 and 73-1256, hereinafter referred to as Petitioner, respectfully petitions the Court to grant a Rehearing by the Court en Banc with respect to the decision and opinion by the Court filed January 9, 1976, which reversed the prior decision of a Division of the Court filed October 30, 1974, and affirmed the District Court.

Although the Federal Rules of Appellate Procedure do not provide specifically for a Second Petition for Rehearing, this Court in a similar situation previously allowed the filing of such a Petition so that it might be considered by the Court, and the Petitioner would have its record complete in the event the Petitioner wished to apply for a Writ of Certiorari. *Frieze, et al.* v. *West American Insurance Company*, 190 F.2d 381 (8th Cir. 1951). For a similar ruling *see*, *Sun Oil Company* v. *Burford, et al.*, 130 F.2d 10 (5th Cir. 1942).

ARGUMENT

I.

The Court En Banc Misconstrued Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (S.Ct. Mo. 1969) and Subsequent Missouri Cases Applying 2 Restatement of Torts, 2d, §402A in Holding That Missouri No Longer Requires a Finding of the Existence of a Duty Before Imposing Liability on a Defendant-Manufacturer for an Alleged Defective Product.

The majority opinion of the Court en banc concluded that when the Supreme Court of Missouri adopted 2 Restatement of Torts, 2d, §402A in *Keener* v. *Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (S.Ct. Mo. 1969) it overruled

its prior holdings as to the duty of a manufacturer in *Stevens* v. *Durbin-Durco, Inc.*, 377 S.W.2d 343 (S.Ct. Mo. 1964) and *Hays* v. *Western Auto Supply Co.*, 405 S.W.2d 877 (S.Ct. Mo. 1966). *Keener* did not and has not changed the law as to the duty of a manufacturer to the users of its products. The adoption of §402A in Missouri was only a change in the form of the existing law and not a change in the substance of the law. This was made abundantly clear in *Keener* at l.c. 364:

> "Whether the words 'strict liability' or 'implied warranty' or both combined are used, the difference in Missouri would not be one of substance since our courts are clearly recognizing the tort nature of the liability imposed."

Missouri merely adopted §402A so that the Bench and Bar could avoid some of the difficulties inherent in imposing strict liability by the vehicle of implied warranty. There was never any intention to change the substantive law of Missouri. The cases cited by Judge Webster in footnote 10 of the Court's en banc opinion have not changed the substantive law of strict liability as it existed prior to *Keener*. Rather, those cases merely deal with procedural matters or are extensions of strict liability based upon both §402A and implied warranty. *Williams* v. *Ford Motor Co.*, 454 S.W.2d 611 (Mo. App. 1970).

The limited duty of a manufacturer for design defects formulated in *Hays* v. *Western Auto Supply Co.*, *supra*, was not expanded by *Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. App. 1970). An inferior tribunal cannot reverse a superior tribunal. Additionally, *Higgins* does not even address the same factual or legal considerations presented in *Hays*. The alleged design defect in *Higgins* caused the casualty, while in *Hays*, rather than causing the casualty it caused the injury. Placing these two cases

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side by side, the conclusion is inevitable that the manufacturer is under an obligation to anticipate foreseeable misuse where the design defect is alleged to have caused the casualty. However, when the design defect is alleged to have caused the injury and not the casualty, the manufacturer is not obligated to anticipate misuse. These cases place an implicit limitation on the responsibility of a manufacturer for misuse of its product. Where the misuse is by a user, rather than a third party it can be reasonably anticipated because there is a limitation on the uses and misuses to which a product may be put. But there is no limit to the uses and misuses to which the product may be subjected. If the manufacturer is required to anticipate acts of misuse by the general public it then becomes an insurer of its product.

The mere adoption of the theory of strict liability contained in §402A does not eliminate the duty requirement under the second collision doctrine. The Supreme Court of Missouri would not apply §402A to the instant case because the alleged design defects did not cause or contribute to cause the accident. It would refuse to adopt the second collision doctrine or apply §402A just as the Supreme Court of Mississippi did in *Walton* v. *Chrysler Motor Corporation*, 229 So.2d 568 (S.Ct. Miss. 1969); *Ford Motor Company* v. *Simpson*, 233 So.2d 797 (S.Ct. Miss. 1970).

II.

The Court En Banc Completely Disregarded the Absence of Any Support, Either Factual or Through Independent Investigation, for Plaintiff's Expert Opinion Testimony That the Roof Supports of the 1970 Maverick Were Defectively Designed.

The Court en banc asserts that Plaintiff's experts' opinions that the roof supports were defective was based

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on the fact that the roof collapsed in the collision, and upon other factors which the Court deemed unnecessary to set forth. In point of fact, there were no other factors to support these opinions. Each of Plaintiff's experts acknowledged that his opinion that the roof supports were defectively designed was based solely on the fact that the roof collapsed in the accident. (Appendix, pp. 89, 102, 112). The trial court prejudicially erred in allowing such testimony.

Rule 705, Federal Rules of Evidence does not provide a basis for the admission of expert opinions without a foundation as urged by Judge Webster. Even if it did, those Rules of Evidence were not in effect at the time this case was tried. Public Law 93-595, §91, January 2, 1975, 88 Stat. 1926 provides the Federal Rules of Evidence would not become effective until July 1, 1975, and would apply only to actions brought, or further procedure in cases then pending, after the effective date of the legislation. The instant cases were tried some 2-1/2 years before the effective date of the Federal Rules of Evidence.

Even if Rule 705, Federal Rules of Evidence had been in effect it furnishes no justification for the trial court's failure to strike the opinions of plaintiff's experts as to any defects in the roof supports. Rule 705 presupposes a foundation upon which to base an expert opinion. Contrary to the opinion of the Court en banc, the transcript of testimony and Appendix prepared herein demonstrate that there was no such foundation.

Opinions of experts must be based upon sufficient factual data to be admissible. Without such a foundation, they are naught but inadmissible speculation. *Twin City Plaza, Inc.* v. *Central Surety & Insurance Corp.*, 409 F.2d 1195 (8th Cir. 1969); *Mittlieder* v. *Chicago and Northwestern R.R. Co.*, 413 F.2d 77, 82 (8th Cir. 1969). Specu-

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lation may not provide the foundation for expert testimony. *Fulton* v. *Chicago, Rock Island & Pacific Railroad Co.*, 481 F.2d 326, l.c. 337, 338 (8th Cir. 1973). While the admission of expert testimony is in the sound discretion of the trial court, that discretion is abused when such testimony is allowed without any foundation whatsoever.

III.

The Court En Banc Disregarded the Absence of Any Evidence in Support of Expert Testimony That the Roof Supports Were Defectively Designed and As to the Cause of Injury or Death of Demple Martin in Holding That There Was Sufficient Evidence to Submit Plaintiff's Case to the Jury.

The Court en banc recognized the allegation that the roof supports were defectively designed was an essential element of Plaintiff's cause of action. Therefore, if there was no evidence to support that element of Plaintiff's cause of action there was insufficient evidence to submit the case to the jury. *Elliot* v. *Alpac Corp.*, 396 F.2d 438 (9th Cir. 1968); *Swiastyn* v. *St. Joseph Light & Power*, 459 S.W.2d 24 (Mo. App. 1970).

The claim for relief as to Plaintiff's decedent, Demple Martin, was for wrongful death. Plaintiffs presented no evidence as to the cause of her death. The parties merely stipulated that she died as a result of injuries sustained in the collision. (Appendix, p. 19). The evidence was that when the Maverick came to rest on its top, Demple Martin was between the roof and the top of the passenger seat. There was no evidence to either establish or negate that she might have sustained fatal injuries from the original impact, or from being thrown around before the car came to rest. In either such event the Defendant would not be liable for the wrongful death, even if a defective design

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existed. Plaintiffs simply failed to present evidence as to an essential element of their cause of action. The Court en banc cannot correct that failure by assuming that the alleged defective design of the Maverick caused the death.

IV.

The Court En Banc Misapprehended Federal Rule 51 and the Doctrine of Plain Error in Holding That the Trial Court's Failure to Properly Charge the Jury in Accordance With Keener v. Dayton Electric Mfg. Co. Was Not Prejudicially Erroneous.

The parties, as well as the Court both in Division and en banc, agree that the District Court erred in failing to give a proper charge to the jury on the issue of strict liability. The Court en banc would excuse this error on the basis that Defendant did not specifically object to the charge as required by Federal Rule 51 and that the Plain Error Rule is not applicable to the trial court's failure.

Defendant made two objections to the trial court's failure to charge the jury that to find for Plaintiff's they must find that the Maverick was being used in a manner reasonably intended, at the time of that collision. A blanket objection was made to the entirety of the charge as not being in accord with the law of Missouri. Defendant contends that this objection alone was sufficient to preserve the error. However, Defendant further objected to the charge on the basis that it was argumentative and *failed to give the jury any guideline as to foreseeability of accidents and purpose of intended use of vehicles.* (Appendix p. 150). While this objection did not use the precise language of *Keener*, it was specific enough to apprise the District Court of the nature of the claimed error. There is no requirement that an objection to the charge be presented in any specific words or manner. (Federal Rule 46).

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The trial court has a duty to charge the jury correctly on all material issues. *Callen* v. *Pennsylvania R. Co.*, 162 F.2d 832 (3rd Cir. 1947), aff'd on other grounds, 332 U.S. 625 (1948); *Rowlik* v. *Greenfield*, 87 F. Supp. 997 (E.D. Pa. 1949), aff'd, 179 F.2d 678 (3rd Cir. 1950). It is agreed by everyone that the District Court failed to do so. Aside from a question as to the sufficiency of defendant's objection this Court can be cognizant of and remedy plain error. Judge Webster succinctly states the rationale under which this case should be reversed and remanded for new trial in his dissent to the Division opinion. Now he has reversed himself and asserts that plain error does not exist.

Judge Webster excuses the trial court's failure to give a proper strict liability charge on the basis that the error was rectified by a reference to "unreasonably dangerous under foreseeable conditions" in the negligence portion of the charge. Judge Webster thus reasons that reading the charge as a whole, the jury was apprised that in order to find for Plaintiff they had to find that the Maverick was being used in a manner reasonably anticipated at the time of the collision. Yet the District Court's statement that "Collisions with or without fault of the user are clearly foreseeable by automobile manufacturers and are statistically inevitable." would seem to imply the exact opposite. Further, under Missouri law a Plaintiff's verdict directing instruction which omits an essential element necessary to predicate the verdict directed is not curable by other instructions. *Higgins* v. *Terminal R.R. Assn. of St. Louis*, 241 S.W 2d 380 (S.Ct. Mo. 1951); *Milliken* v. *Trianon Hotel Co.*, 364 S.W.2d 71 (Mo. App. 1962). A party is entitled in the jury charge to a clear and unequivocal statement of the law. *Emery* v. *Northern Pacific Railroad Co.*, 407 F.2d 109 (8th Cir. 1969). The mixed and garbled charge to the jury in the instant case which intertwined theories

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and misstated the necessary elements to sustain a verdict does not meet this requirement.

Judge Webster also seeks to excuse the trial court's error on the ground that there is no requirement in Missouri that a strict liability charge comport with *Keener*. This rationale will not withstand analysis. The Supreme Court of Missouri has adopted Missouri Approved Instructions. M.A.I. Instruction No. 25.04 provides a verdict directing instruction in strict liability cases which contain each element of the *Keener* instruction as it would apply to a manufacturer. Jury instructions under M.A.I. are covered by Rule 70.01, Missouri Rules of Civil Procedure and require the giving of an M.A.I. instruction when there is one in existence. In regard to instructions, Rule 70.01 (c) provides:

> "The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined."

Thus, it is quite clear that under Missouri law the District Court's charge herein would be erroneous. Yet Judge Webster stated that the failure to follow the *Keener* form of instruction (also presumably M.A.I. form) does not warrant reversal. In support of this contention, he cites in footnote 18, *Higgins* v. *Paul Hardeman, Inc.*, 457 S.W.2d 943 (Mo. App. 1970) and *Maryland Casualty Co.* v. *Dondlinger & Sons Construction Co.*, 420 F.2d 1368 (8th Cir. 1970). Neither of these cases stands for the proposition cited. As this Court pointed out in *Dondlinger* v. *Maryland Casualty*, that case was tried prior to the decision in *Keener*. In fact, the decision of the St. Louis Court of Appeals in *Higgins* v. *Paul Hardeman, Inc.* stands in opposition to the contention urged by Judge Webster. As was observed in footnote 1 of that decision:

> "As will later appear, defendants urge in their Briefs the hoist was being used in a manner for which it was not intended. It would therefore seem that this was an issue in the case. If it was, it should have been submitted as provided in *Keener* v. *Dayton Electric Mfg. Co.* . . . ."

This Court has authority to consider grounds of error in spite of an alleged failure to object where a manifest injustice would occur. This is such a case, for as Judge Webster observed, at page 17 of the majority opinion:

> "It is the test of 'reasonably anticipated' applied in *Keener* which keeps the application of strict liability in second collision situations from making the manufacturer an absolute insurer and thus producing an absurd and unjust result."

The trial court's failure to properly instruct the jury placed Defendant in the position of an absolute insurer. This Court's refusal to remedy that error under the Plain Error Rule constitutes a manifest injustice.

CONCLUSION

For all the above and foregoing this Second Petition for Rehearing should be granted.

Respectfully submitted,

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Of Counsel

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United States Court of Appeals

FOR THE EIGHT CIRCUIT

September Term, 1975

73-1255

Thomas Polk,
Appellee,
vs.
Ford Motor Company,
Appellant.

73-1256

Ethel Lee Marshall, Guardian,
Appellee,
vs.
Ford Motor Company,
Appellant.

Appeals from the United States District Court for the Western District of Missouri

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The Court having considered second petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 19, 1976

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APPENDIX "F"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1975

No. 73-1255

Thomas Polk,
Appellee,
vs.
Ford Motor Company,
Appellant.

No. 73-1256

Ethel Lee Marshall, Guardian,
Appellee,
vs.
Ford Motor Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri

On motion of appellant, it is now here ordered that the issuance of mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

September Term, 1975

No. 73-1255

Thomas Polk,
Appellee,

vs.

Ford Motor Company,
Appellant.

No. 73-1256

Ethel Lee Marshall, Guardian,
Appellee,

vs.

Ford Motor Company,
Appellant.

Appeals from the United States District Court
for the Western District of Missouri

On Consideration of the motion of appellant for a stay of the mandate in these causes pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed to and including April 14, 1976, and if within said period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 23, 1976

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APPENDIX "G"

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 73-1255

Thomas Polk,
Appellee,

vs.

Ford Motor Company,
Appellant.

No. 73-1256

Ethel Lee Marshall, Guardian,
Appellee,

vs.

Ford Motor Company,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

(Filed January 9, 1976)

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

January 9, 1976

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FILED
MAY 8 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
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vs.

THOMAS POLK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States

OPINIONS BELOW

The United States District Court for the Western District of Missouri, Western Division, rendered no opinion. The panel opinion of the United States Court of Appeals for the Eighth Circuit is unreported, but is appended to the Petition for a Writ of Certiorari. This opinion was filed on October 30, 1974, Nos. 73-1255 and 73-1256. Appellees' Petition for Rehearing En Banc was granted on November 22, 1974.

The opinion of the United States Court of Appeals for the Eighth Circuit on rehearing en banc is reported at 529 F.2d 259. The Second Petition for Rehearing En Banc was denied on February 19, 1976.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

STATE CONSTITUTIONAL PROVISION AND RULE OF COURT INVOLVED

Article I, Section 22(a), Constitution of The State of Missouri.

Right of trial by jury—qualifications of jurors—two-thirds verdicts.

That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the

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> trial of criminal and civil cases in courts not of record may consist of less than 12 citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury.

Rule 20.R.1., Rules of the United States District Court for the Western District of Missouri.

> Unless otherwise specially ordered by the court in a designated civil action or consolidated actions, the juries shall consist of six members in all civil cases, including but not limited to complex cases.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

QUESTION PRESENTED

Is the District Court sitting in a diversity case required to empanel a jury of twelve members in derogation of a local court rule limiting juries to six members when the law of the forum state requires a twelve-member jury?

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. The Federal Courts Which Have Considered the Issue Raised by Petitioner Have All Held That the Erie Doctrine Does Not Require the District Court Sitting in a Diversity Action to Apply the Law of the Forum State Pertaining to the Size of the Jury.

The sole reason given by the Petitioner in support of its request that the Court grant a Writ of Certiorari is the assertion that the right to a twelve-member jury guaranteed by state law in state proceedings is a *substantive* right which must be recognized and protected in federal diversity proceedings under the holding of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). However, petitioner has failed to cite a single federal case which holds or even implies that state law relating to trial by jury is a *substantive* matter within the meaning of the *Erie* doctrine. In fact, every federal authority considering the subject has ruled to the contrary.

The precise question raised by the petitioner has now been considered by four Circuit Courts of Appeals and each has ruled adversely to petitioner's position. *Polk* v. *Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976); *Palmer* v. *Ford Motor Co.*, 498 F.2d 952 (10th Cir. 1974); *Dashiell* v. *Keauhou-Kona Co.*, 487 F.2d 957 (9th Cir. 1973); *Wilson* v. *Nooter Corp.*, 475 F.2d 497 (1st Cir.), *cert. denied* 414 U.S. 865 (1973). In each of these decisions the Courts held that state practice requiring a twelve-member jury does not mandate a trial by a twelve-member jury in the federal court in a diversity action. In each case the Court considered the argument that the state practice was engrafted upon the federal practice by the *Erie* doctrine,

and in each case the argument was rejected on the grounds that the number of jurors required under state law is a *procedural* matter which need not be followed in a federal diversity action under *Erie*. No contrary decision has been cited to this Court and none appears from respondents' research. Thus, the Petitioner has failed to make any showing that the decision of the Eighth Circuit Court of Appeals conflicts with the decisional law in the other Circuits or that it departs in any way from the usual course of federal proceedings.

II. This Court Has Consistently Held That Matters Pertaining to the Jury Process in the Federal Courts Are Governed by Federal Law Without Regard to State Laws or Practices.

Under the clear pronouncements of this Court, the decision below was manifestly correct. In diversity cases state practice pertaining to trial by jury has long been subjugated to the federal practice. In *Simler* v. *Conner*, 372 U.S. 221 (1963), the Court held that the question of whether an action was legal or equitable and therefore whether a jury trial is to be afforded at all must be determined by reference to federal law without regard to state law. The Court stated:

> We agree with the respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. . . . Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. In diversity cases, of course, the substantive dimensions of the claim asserted finds its

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> source in state law, Erie R. Co. v. Tompkins . . . but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law.

372 U.S. at 222.

Similarly, in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), the Court, holding that federal law controls the allocation of the fact-finding process between judge and jury stated:

> The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern P. Co., 283 U.S. 91, 75 L.Ed. 857, 51 S.Ct. 383. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.
>
> We think that in the circumstances of this case the federal court should not follow the state rule. It cannot be gainsaid that there is a strong federal policy

> against allowing state rules to disrupt the judge-jury relationship in the federal courts.

356 U.S. at 537-8. *See also Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959).

The federal decisions uniformly hold that litigants in federal diversity cases have no Seventh Amendment right to a trial by a jury consisting of twelve persons. *Colgrove* v. *Battin*, 413 U.S. 149 (1973); *Arcieri* v. *Erie Lackawanna Railway Co.*, 484 F.2d 451 (6th Cir. 1973); *Bernard* v. *Omaha Hotel, Inc.*, 482 F.2d 1222 (8th Cir. 1973); *Winsby* v. *John Oster Manufacturing Co.*, 482 F.2d 276 (3d Cir. 1973); *Cooley* v. *Strickland Transportation Co.*, 459 F.2d 779 (5th Cir. 1972). Petitioner has plainly failed to show that the decision of the Eighth Circuit Court of Appeals is contrary to a controlling decision of this Court or any other federal court which has considered the question.

As noted by this Court, a federal court sitting in a diversity case is "only another court of the State" and may not "substantially affect the enforcement of a right as given by the State." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-9 (1945). However, as a matter of federal law, the size of the jury is not outcome-determinative. *See Colgrove* v. *Battin, supra,* at 160 where the Court said:

> We had no difficulty reaching the conclusion in Williams that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was "no discernible difference between the results reached by the two different-sized juries," 399 US at 101, 26 LE2d 446, drew largely upon the results of studies of the operations of juries of six in civil cases. Since then, much has been written about the six-member jury, but nothing that persuades us

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> to depart from the conclusion reached in Williams. Thus, while we express no view as to whether any number less than six would suffice, we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.

See also Williams v. *Florida*, 399 U.S. 78, 100-102 (1970), holding that the Sixth Amendment does not prohibit a six member jury in criminal cases, where this Court stated:

> The purpose of a jury trial, as we noted in Duncan, is to prevent oppression by the government. . . . [W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 —particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact finder hardly seems likely to be a function of size.
>
> * * *
>
> What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries. In short, neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members.

Indeed, if the outcome of the instant case was affected by the application of state jury practice in the federal court, the outcome was skewed in Petitioner's favor because the Missouri law permits a verdict by nine of the twelve jurors in a civil case, Mo. Const. art I, § 22(a), rather than the unanimous verdict required in the federal court. It is clear under every test that the state practice requiring a twelve-member jury is not a substantive mat-

ter which must be applied in the federal court under the *Erie* doctrine. Every federal court which has considered the question has so ruled.

CONCLUSION

Respondent respectfully submits that petitioner has failed to establish any reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way which conflicts with the applicable decisions of this court or another Court of Appeals on the same matter. The Court of Appeals correctly held that the size of a jury in a diversity case is a procedural matter which is to be governed by federal law. Therefore, and for the reasons stated above, respondent states that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
MAY 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1428

THE FORD MOTOR COMPANY,
Petitioner,

vs.

THOMAS POLK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

TO: The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States

I.

No Federal Court Has Considered or Addressed the Question of Whether a District Court Sitting in a Diversity Action Is Required by Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) to Apply the Law of the Forum State Establishing the Size of Juries in Civil Cases Where a State's Constitution Specifically Requires That Civil Trials Be to a Twelve-Person Jury.

Respondent incorrectly asserts that the question presented by Petitioner's application for Writ of Certiorari has been previously decided adversely to Petitioner by four

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Circuit Courts of Appeal. No Federal Court has ruled on the question whether a U.S. District Court is required by *Erie Railroad Company* v. *Tompkins, supra,* to empanel a twelve-person jury in civil cases, in contradiction to a local District Court rule, when the state's constitution and its Supreme Court decisions require a twelve-person jury as a matter of substantive right.

The Eighth Circuit, in the instant case, is the only Circuit Court of Appeals to hold that the right to trial before a twelve-person jury when mandated by state constitution and state Supreme Court decisions is procedural rather than substantive. The Ninth Circuit Court of Appeals in *Dashiell* v. *Keauhou-Kona Company,* 487 F.2d 957 (9th Cir. 1973) merely held that an opinion of that state's attorney general as to jury size was not a sufficient expression of state law to warrant the invocation of the doctrine of *Erie Railroad Company* v. *Tompkins, supra.* The First Circuit Court of Appeals ruled similarly in *Wilson* v. *Nooter Corporation,* 475 F.2d 497 (1st Cir., 1973), denied 414 U.S. 865 (1973). The application of the doctrine of *Erie Railroad Company* v. *Tompkins, supra,* was not warranted in that case solely because the Court did not believe there was a sufficiently recent expression of New Hampshire law on the issue. The latest opinion of the Supreme Court of New Hampshire requiring a twelve-person jury in civil cases was issued in 1875. The judges of the First Circuit therefore assumed they had the right to reject state law and speculated that the Supreme Court of New Hampshire would reverse itself were it then presented with the identical question.

Neither *Dashiell* v. *Keauhou-Kona Company, supra,* nor *Wilson* v. *Nooter Corporation, supra,* has any application to the instant case. The requirements of the Missouri constitution are not dependent on an interpretation by the Missouri attorney general. Rather there is a clear and distinct

mandate which requires a twelve-person jury in civil cases. Article I, Section 22(a) Constitution of the State of Missouri provides:

> "That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of criminal and civil cases in courts not of record may consist of less than 12 citizens as may be prescribed by law, and a two-thirds majority of such number concurring may render a verdict in all civil cases; that in all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that in every criminal case any defendant may, with the assent of the court, waive a jury trial and submit the trial of such case to the court, whose finding shall have the force and effect of a verdict of a jury."

There is no doubt as to the meaning and requirement of Article I, Section 22(a) Constitution of the State of Missouri.

The substantive state right of the citizens of Missouri to have civil cases tried before a twelve-person jury is not of ancient or questionable heritage. In addition to the provisions of the Constitution of the State of Missouri, the Supreme Court of Missouri has consistently held for the last 116 years, and as recently as 1972, that a citizen's right to trial before a twelve-person jury is the substantive right which cannot be denied. *Vaughn* v. *Scade*, 30 Mo. 600 (1860); *Rodenhauser* v. *Lashly*, 481 S.W.2d 231 (S.Ct.Mo. 1972); *Beggs* v. *Universal C.I.T. Credit Corp.*, 387 S.W.2d 499 (S.Ct.Mo. en banc 1965).

Respondent also relies on *Palmer* v. *Ford Motor Company*, 498 F.2d 952 (10th Cir., 1974) as supporting the proposition that right to trial before a twelve-person jury is merely procedural. *Palmer* v. *Ford Motor Company, supra,*

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does not support the proposition urged. Rather, the Court of Appeals for the Tenth Circuit merely held that the Kansas statute allowing deviation from a twelve-person jury was procedural. However, the Court acknowledged that under proper circumstances, such as the constitutional provision specifying jury size, their holding could well be different. For unlike the Missouri Supreme Court, which has held that the size of a jury is substantive and "bound up" with the rights and obligations of the cause of action, the Kansas Supreme Court has ruled to the contrary. *Bourne* v. *Atchison, Topeka & Santa Fe Railway Company*, 209 Kan. 511, 497 P.2d 110 (1972). This is clearly contrary to the rulings of the Missouri Supreme Court. The Tenth Circuit Court of Appeals would have reached a different result on different facts for it correctly recognized that *Colgrove* v. *Battin*, 413 U.S. 149 (1973), is not dispositive of the issue presented.

The authorities relied upon by Respondent in seeking to restrict the doctrine of *Erie Railroad Company* v. *Tompkins*, *supra*, do not support Respondent's position. There is an unmistakably clear statement of the law of Missouri which requires the invocation of the doctrine of *Erie Railroad Company* v. *Tompkins*, *supra*.

The law of Missouri is not vague and, therefore, subject to indiscriminate interpretation by the judges of the Eighth Circuit Court of Appeals. Federal Courts are bound to follow the law of the forum in diversity cases. *Yoder* v. *Nu-Enamel Corporation*, 117 F.2d 488 (8th Cir., 1941); *Ross* v. *Philip Morris & Co., Ltd.*, 328 F.2d 3 (8th Cir., 1964); and *Elliott* v. *Alpac Corporation*, 396 F.2d 438 (9th Cir., 1968).

This mandate cannot be disregarded by the District Court for the Western District of Missouri or the United States Court of Appeals for the Eighth Circuit.

II.

The Federal Courts Have Never Ruled the Question of Whether a Federal District Court Sitting in a Diversity Case Is Required by Virtue of the Doctrine of Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938) to Empanel a Twelve-Person Jury As Required by State Constitution and in Contradiction to a Local Rule of the Federal District Court.

Respondent argues that state practice pertaining to jury size in civil cases has long been subjugated to federal control; *Simler* v. *Conner*, 372 U.S. 221 (1963) and *Byrd* v. *Blue Ridge Electric Cooperative*, 356 U.S. 525 (1958). Neither *Simler* v. *Conner, supra*, nor *Byrd* v. *Blue Ridge Electric Cooperative, supra*, are applicable to the instant case.

Simler v. *Conner, supra*, dealt solely with the issue of whether the right to trial by jury guaranteed by the Seventh Amendment to the United States Constitution was to apply in diversity cases. This Court's decision merely required uniformity in application of the Seventh Amendment right to jury trial. The existence of the right to jury trial was in issue and not the extent of the exercise of that right. Clearly, there was no issue as to jury size.

Byrd v. *Blue Ridge Electric Cooperative, supra*, is likewise inapplicable to the instant case. The question therein was whether a decision by the Supreme Court of South Carolina requiring a determination of an employer's statutory immunity under the South Carolina Workmen's Compensation statute by the Court rather than a jury should be given effect in Federal Courts. There was no reason for the South Carolina policy requiring immunity questions to be decided exclusively by the Court. The South Carolina policy was merely a mode for enforcing the immunity and

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not a part of the cause of action intended to be bound up with the rights and obligations of the parties. In exempting the District Court from the state law, this Court in *Byrd* found that the essential character of the Federal Court and the District Judge would be altered if state law was given effect. *Byrd* was not intended to have the reach Respondent urges for there was a specific recognition that the right to trial by jury is a substantial part of any cause of action. No question of altering the function of the Federal Court is involved in the instant case. Therefore, *Byrd* v. *Blue Ridge Electric Cooperative, supra,* has no application.

There is no valid reason for denying application of the *Erie* doctrine. Uniformity of the federal system is not involved. There is no question involving the existence of a right to jury trial. Rather the question is the extent to which the citizens of the several states may enjoy the exercise of that right. The citizens of Missouri and the Missouri Supreme Court have determined that as a matter of substantive right the full exercise of the right to trial by jury requires trial before a twelve-person jury. The Federal Courts have no basis for denying this right under the claim that it is procedural in nature. The invocation of the *Erie* doctrine and thereby the application of the Constitution of Missouri would not essentially alter the character or function of the Federal Courts.

The fact that federal decisions hold that there is no Seventh Amendment right to a trial by a jury consisting of twelve persons is irrelevant. Further, the fact that a federal court may have held jury size not to be outcome-determinative has no bearing on the application of the rights guaranteed by the Missouri Constitution and the Supreme Court of Missouri under the *Erie* doctrine. *Colgrove* v. *Battin, supra,* has no application to the issue presented. As the Tenth Circuit Court of Appeals observed, where jury size

is "bound up" in the rights and obligations of the cause of action, as it is in the state of Missouri, the Federal Court is then obligated by the *Erie* doctrine to follow state court to the fullest extent; *Palmer* v. *Ford Motor Company*, 498 F.2d 952 (10th Cir., 1974). The question presented is simply whether Petitioner will be afforded its substantive right to trial before a twelve-person jury as required by Article I, Section 22(a), Constitution of the State of Missouri, 1945, and *Erie Railroad Company* v. *Tompkins, supra.*

CONCLUSION

Petitioner respectfully submits that the Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 9, 1976, on the sole basis that the Court of Appeals has decided an important state question in a way in conflict with applicable state law.

Respectfully submitted,

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